In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. 40

GILBERTVILLE TRUCKING CO., INC., THE L. NELSON & SONS TRANSPORTATION COMPANY, CHARLES G. CHILBERG, CLIFFORD J. O. NELSON, GRETA C. CARLSON, and KENNETH A. H. NELSON,

APPELLANTS,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR APPELLANTS

HENRY E. FOLEY
LOYD M. STARRETT
WILLIAM G. BUSS, JR.
10 Post Office Square
Boston 9, Massachusetts
Counsel for Appellants

MARY E. KELLEY
10 Tremont Street
Boston 8, Massachusetts
Of Counsel

Blanchard Printing Company, Boston, Mass. — Law Printers

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	4
Summary of Argument	10
Argument	13
I. In Deciding Critical Issues as to Violation of Law and Continuance Thereof, the Commission and the District Court Disregarded the Elementary Principles Requiring That the Commission's Decision Disclose the Grounds Upon Which It Was Based and Be Judicially Reviewed Upon Those Grounds	13
A. The Commission failed to state basic findings or reasoning adequate to disclose the grounds for its ultimate findings on those issues	13
B. The District Court erred by deciding the issues as to violation of law upon findings of fact and a legal theory different from those relied upon by the Commission	22
II. In Denying the Application for Approval of the Proposed Merger, the Commission Disregarded Mandatory Considerations Prescribed by the Interstate Commerce Act and Applied Instead a Single Arbitrary Standard	29
III. Although the Commission Inserted a Requirement of Divestiture in Its Order, There Is No Indication That the Commission Exercised Discretion With Respect to That Requirement	37
IV. The District Court Did Not and Could Not Find the Commission's Decision or Its Findings Supported by Substantial Evidence	47

Page

Conclusion 54
Appendix A A-1

Table of Citations

Cases

Amalgamated Meat Cutters & Butcher Workmen v. National Labor Relations Board, 352 U.S. 153 21
American Trucking Assocs. v. United States, 264 U.S. 1 ..... 18, 22
American Trucking Assocs. v. United States, 355 U.S. 141 18
Atchison, Topeka & Santa Fe Ry. Co. v. United States, 295 U.S. 193 17
Atlanta & Saint Andrews Bay Ry. Co. v. United States, 194 F. Supp. 493 (M.D. Ala. 1952) 16
Atlas Corporation, 21 C.A.B. 425 (1955) 36
Baltimore Transfer Co. v. Interstate Commerce Commission, 114 F. Supp. 558 (D. Md. 1953), *aff'd*, 346 U.S. 890 30
Beaumont, Sour Lake & Western Ry. Co. v. United States, 282 U.S. 74 16
Bolleubach v. United States, 326 U.S. 607 21
Brown v. Board of Education of Topeka, Kansas, 349 U.S. 294 45
Brown v. Western Massachusetts Theatres, Inc., 288 F.2d 302 (1st Cir. 1961) 53
Cantlay & Tanzola, Inc. v. United States, 115 F. Supp. 72 (S.D. Cal. 1953) 35
Cater v. Civil Aeronautics Board, 275 F.2d 518 (1st Cir. 1960) 23
Central of Georgia Ry. Co. Control, 307 I.C.C. 39 (1958) 21, 30
Colorado-Wyoming Gas Co. v. Federal Power Commission, 324 U.S. 626 ..... 13, 15, 23, 34

Page

Communist Party v. Subversive Activity Control Board, 351 U.S. 115 23

Continental Insurance Co. v. United States, 259 U.S. 156 42

County of Marin v. United States, 356 U.S. 412 ..... 2, 29, 36, 44

Eastern Central Motor Carriers Assn. v. United States, 321 U.S. 194 ..... 34, 39

Ethel B. Ecke Contract Road Blue Coaches, Inc., 56 M.C.C. 617 (1950) 31

Escanaba & Lake Superior R.R. v. United States, 303 U.S. 313 44

Federal Communications Commission v. RCA Communications, Inc., 346 U.S. 86 35

Federal Trade Commission v. Henry Broch & Co., 368 U.S. 360 39

Florida v. United States, 282 U.S. 194 ..... 10, 13, 15, 16

Galt & Southern Transportation Co., Inc., Extension—Cantara, Florida, 71 M.C.C. 1 (1957) 17

Otto J. Hawkins Contract Rebate Trucking Co., 37 M.C.C. 617 (1941) 30

Hartford-Empire Co. v. United States, 323 U.S. 386 ..... 41, 42, 46

Hecht Company v. Bowles, 321 U.S. 321 45

Hoaff Transfer, Inc. v. United States, 105 F. Supp. 851 (D. W.Va. 1952) 51

Hughes v. United States, 342 U.S. 353 44

Inland Motor Freight v. United States, 60 F. Supp. 520 (E. D. Wash. 1945) 17

International Ladies' Garment Workers Union, A.F.L.-C.I.O. v. National Labor Relations Board, 365 U.S. 731 35

Interstate Commerce Commission v. J-T Transport Co., Inc., 368 U.S. 81 ..... 11, 26, 35

Jacob Siegel Co. v. Federal Trade Commission, 327 U.S. 608 ..... 12, 38, 40, 41,

Page

Petition of Knight, 122 F. Supp. 322 (S.D.N.Y. 1954) 34
Local 60, United Brotherhood of Carpenters & Joiners v. National Labor Relations Board, 365 U.S. 651 ... 40
Masten Transportation, Inc.-Merger-Masten Trucking Co., Inc., 70 M.C.C. 421 (1957) 31
McLean Trucking Co. v. United States, 321 U.S. 67 .. 2, 11, 30, 44
Minneapolis & St. Louis Ry. Co. v. United States, 361 U.S. 173 ..... 2, 14
National Labor Relations Board v. District 50, United Mine Workers, 355 U.S. 453 37
National Labor Relations Board v. Express Publishing Co., 312 U.S. 426 ..... 39, 45
National Labor Relations Board v. Insurance Agents' International Union, 361 U.S. 477 35
Navajo Freight Lines, Inc. v. United States, 186 F. Supp. 377 (D. D. C. 1960) 18
New York v. United States, 342 U.S. 882 39
New York Central R. Co. v. United States, 99 F. Supp. 394 (D. Mass. 1951) *affirmed*, 342 U.S. 890 15
Panama Refining Co. v. Ryan, 293 U.S. 388 39
Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177 ..... 12, 38, 39
Powell-Purchase-Rampy, 57 M.C.C. 597 (1951) 30
Railway Labor Executives' Association v. United States, 151 F. Supp. 108 (D.D.C. 1957) 51
Saginaw Broadcasting Co. v. Federal Communications Commission, 96 F.2d 554 (D.C. Cir. 1938), *cert. denied*, 305 U.S. 613 39
Schine Theatres v. United States, 334 U.S. 110 43
Schwabacher v. United States, 334 U.S. 182 .... 36, 43, 44
Secretary of Agriculture v. United States, 347 U.S. 645 34
Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80 ..... 10, 13, 22, 23, 29

Page

Sellers Control-Huckaba Transport Corp., 80 M.C.C. 429 (1959) 30
Charles C. Sherman, 15 C.A.B. 876 (1952) 36
Slochower v. Board of Higher Education, 350 U.S. 551 34
Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 43
State v. E. I. Dogle & Co., 96 Atl. 605 (R.I. 1916) 17
Timken Roller Bearing Co. v. United States, 341 U.S. 593 ..... 12, 40, 42
Toth v. United States, 349 U.S. 163 34
Truitt Mfg. Co. v. National Labor Relations Board, 351 U.S. 149 35
United States v. American Tobacco Co., 221 U.S. 106 42, 43
United States v. Baltimore & O. R. Co., 293 U.S. 454 ... 43
United States v. Borden Co., 370 U.S. 460 45
United States v. Carolina Freight Carriers Corp., 315 U.S. 475 13
United States v. Chicago, M., St. P. & Pac. R.R. Co., 294 U.S. 499 ..... 10, 17, 22
United States v. Crescent Amusement Co., 323 U.S. 173 46
United States v. E. I. duPont de Nemours & Co., 366 U.S. 316 ..... 12, 41, 43, 44, 45
United States v. Fortness, 125 F.2d 928 (2d Cir. 1942), *cert. denied sub. nom Salamanca v. United States*, 316 U.S. 694 40
United States v. Lehigh Valley R.R., 254 U.S. 255, ... 41
United States v. Minnesota Mining & Mfg. Co., 96 F. Supp. 356 (D. Mass. 1952), *modifying decree issued, following discussion in* 92 F. Supp. 947 (1950) 43
United States v. National Lead Co., 332 U.S. 319 42
United States v. Reading Co., 253 U.S. 26 41
United States v. United Shoe Machinery Co., 247 U.S. 32 45
United States v. W. T. Grant Co., 345 U.S. 629 45

Page

Vanity Fair Paper Mills, Inc., 3 CCH Trade Reg. Rep. Par. 15,796 39
Wieman v. Updegraff, 344 U.S. 183 34
Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 ..... 32, 47, 48

Statutes

Administrative Procedure Act,
7(c), 60 Stat. 241 (1946), 5 U.S.C. 1006(c) 3, 16, 26
8(b), 60 Stat. 242 (1946), 5 U.S.C. 1007(b) 3, 10, 14, 20, 39
10(e), 60 Stat. 243 (1946), 5 U.S.C. 1009(e) 3, 22
Federal Aviation Act of 1958, 408 and 409, 72 Stat. 767-88, as amended, 74 Stat. 901 (1960), 49 U.S.C. 1378 and 1379 36
Federal Trade Commission Act 5(b), as amended, 52 Stat. 112 (1938), 15 U.S.C. 45(b) 20
Interstate Commerce Act,
National Transportation Policy, 54 Stat. 889 (1940) 3, 29, 36, 46
5(2), as amended, 54 Stat. 905 (1940), as amended, 63 Stat. 485 (1949), 49 U.S.C. 5(2) 3, 4, 6, 7, 8, 9, 11, 18, 21, 29, 30, 31, 32, 33, 34, 35, 36, 37, 46
5(4), as amended, 54 Stat. 907 (1940), 49 U.S.C. 5(4) 3, 5, 6, 7, 8, 9, 10, 11, 13, 15, 19, 20, 21, 25, 27, 28, 29, 31, 33, 36, 37, 38, 46
5(5), as amended, 54 Stat. 907 (1940), 49 U.S.C. 5(5) 3, 6, 7, 8, 9, 14, 15, 18, 27, 28, 29, 32, 33, 36, 46

Page

5(6), as amended, 54 Stat. 908 (1940), 49 U.S.C. 506) 3, 6, 7, 8, 9, 10, 14, 15, 18, 27, 28, 29, 33, 36, 40

5(7), as amended, 54 Stat. 908 (1940), 49 U.S.C. 507) 3, 5, 10, 12, 19, 20, 21, 29, 33, 36, 38, 43, 46

17(9), as amended, 54 Stat. 916 (1940), 49 U.S.C. 17(9) 2

Judicial Code

28 U.S.C. 1253 2

28 U.S.C. 1336 2

28 U.S.C. 2101(b) 2

28 U.S.C. 2325 2

National Labor Relations Act (49 Stat. 449), as amended, 61 Stat. 147 (1947), 29 U.S.C. (1964 ed.) 20

Miscellaneous

Adams,

Dissolutions, Divorcement, Divestiture: The Parties, Victories of Antitrust, 27 Ind. L.J. 1 (1951) 43, 44

77 Cong. Rec. 4258 18

Hearings on H.R. 9650 Before the House Committee on Interstate and Foreign Commerce, 72d Cong., 1st Sess. 33 (1932) 15, 18, 19, 28, 36, 44

H.R. Rep. No. 2046, 76th Cong., 3d Sess. (1940) 41

H.R. Rep. No. 1217, 76th Cong., 1st Sess. (1939) 41

H.R. Rep. No. 193, 73d Cong., 1st Sess. (1933) 18, 28, 43

H.R. Rep. No. 2789, 71st Cong., 3d Sess. (1931) 18, 19

H.R. Rep. No. 650, 66th Cong., 2d Sess. (1920) 41

H.R. Rep. No. 456, 66th Cong., 1st Sess. (1919) 44

Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 Harv. L. Rev. 904 (1962) 40

Page

Landis, *The Administrative Process* (1938) 39, 40, 45

Levi, *How to Comply with the Antitrust Laws*, (1959 CCH Antitrust Symposium) 44

Pomeroy, Equity Jurisprudence § 109 (5th ed. 1941) .. 45

S. Rep. No. 433, 76th Cong., 1st Sess. (1939) 44, 45

S. Rep. No. 87, 73d Cong., 1st Sess. (1933) .. 18, 20, 28, 44

Timberg, *Some Justifications for Divestiture*, 19 Geo. Wash. L. Rev. 132 (1950) 44

United States Attorney General's Committee, *Study of the Antitrust Laws* (1955) 41

In the
Supreme Court of the United States

OCTOBER TERM, 1962

No. 40

GILBERTVILLE TRUCKING CO., INC., THE L. NELSON & SONS TRANSPORTATION COMPANY, CHARLES G. CHILBERG, CLIFFORD J. O. NELSON, GRETA C. CARLSON, and KENNETH A. H. NELSON,

APPELLANTS,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR APPELLANTS

Appellants have appealed from a final judgment of the United States District Court for the District of Massachusetts which dismissed their suit to enjoin and set aside certain orders of the Interstate Commerce Commission.

Opinions Below

The opinion of the District Court for the District of Massachusetts, which contained its findings of fact and conclusions of law (R. 108-26), is reported at 196 F. Supp. 351. The Report of the Interstate Commerce Commission on Reconsideration (R. 11-24) is reported at 80 M.C.C. 257; the Prior Report by Division 4 (R. 81-93) is reported at 75 M.C.C. 45; the Report of the Examiner (R. 30-80) is unpublished.

Jurisdiction

This suit was brought in the court below pursuant to 28 U.S.C. § 1336 and 49 U.S.C. § 17 (9) (54 Stat. 916 (1940)), and was heard and determined by a district court of three judges as required by 28 U.S.C. § 2325. The judgment of the District Court was entered on July 18, 1961, and notice of appeal was filed in that Court on September 11, 1961. (R. 127) The Jurisdictional Statement was filed November 10, 1961, and probable jurisdiction was noted by this Court. February 19, 1962 (R. 688). The jurisdiction of this Court to review the District Court's judgment on this direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b) and has been sustained in, e.g., *Minneapolis & St. Louis Railway Co. v. United States*, 361 U.S. 173; *County of Marin v. United States*, 356 U.S. 412; *McLean Trucking Co. v. United States*, 321 U.S. 67.

Questions Presented

1. Did the Commission and the District Court fail to comply with essential requirements of the Administrative Procedure Act, the Interstate Commerce Act and the decisions of this Court, in that, although the Commission's Re-

port indiscriminately states a number of facts (including many trivial, irrelevant, innocent and ambiguous matters),

a. the ultimate conclusions asserted by the Commission were not supported by necessary basic findings, by reasoning or by any explanation whatsoever?

b. the District Court's purported affirmance of the Commission was based upon findings and assumptions of fact by the District Court which were contrary to findings made by the Commission, rejection of other facts upon which the Commission may well have relied, and a legal theory different from that upon which the Commission had decided the case?

2. Did the Commission err in ruling that a finding of a violation of law compels the denial of an application for approval of a proposed merger

a. even if the proposed merger is consistent with the public interest?

b. even if the supposed violation found was innocent?

3. Did the Commission fail to comply with essential requirements of the Administrative Procedure Act, the Interstate Commerce Act and the decisions of this Court by ordering an individual to sell all of the stock of a specified carrier without having found such an order necessary?

4. Did the District Court err in affirming the Commission's decision without finding or being able to find that the Commission's decision or its findings were supported by substantial evidence on the whole record?

Statutes Involved

Relevant parts of sections 7(c), 8(b), and 10(e) of the Administrative Procedure Act (60 Stat. 241, 242, 243; 5 U.S.C. §§1006(c), 1007(b), 1009(e)), the National Transportation Policy (54 Stat. 899), and sections 5(2), 5(4), 5(5), 5(6), and 5(7) of the Interstate Commerce Act, as

amended (54 Stat. 905, 907, 908, 63 Stat. 485; 49 U.S.C. (5(2), 5(4), 5(5), 5(6) and 5(7)) are set forth as Appendix A hereto, and are hereinafter cited by act and section number alone.

STATEMENT

On October 6, 1955, seven years ago, two incorporated interstate motor carriers, The L. Nelson & Sons Transportation Company (hereinafter called Nelson Co.) and Gilbertville Trucking Co., Inc. (hereinafter called Gilbertville Co.) filed with the Interstate Commerce Commission a joint application pursuant to section 5(2) of the Interstate Commerce Act. The application sought Commission approval of a proposed transaction by which Nelson Co. would acquire control of Gilbertville Co. (through an exchange of stock and subsequent merger of the two carriers) and derivative control of Gilbertville Co. would be acquired by Nelson Co.'s two principal stockholders, Charles G. Chilberg and Clifford J. O. Nelson, who are also directors and, respectively, president and treasurer and secretary and assistant treasurer of Nelson Co. (Pl. Ex. A,[1] at R. 131-81, 195-96.)

Nelson Co., a Connecticut corporation domiciled at Ellington, Connecticut, does business as a common carrier by motor vehicle in interstate commerce. It holds irregular route authority to transport general commodities intrastate in Connecticut and Massachusetts and specified commodities associated with the manufacture of cloth infer-

[1] The entire record of proceedings before the Commission (which was offered in evidence at R. 103 and admitted at R. 107) was marked as "Plaintiff's Exhibit A." Inasmuch as that "Plaintiff's Exhibit A" comprises the bulk of the printed Transcript of Record before this Court (R. 131-688), portions thereof will hereinafter be cited only by the page or pages in the Transcript of Record where the specific portion referred to may be found.

state between certain points in New England and certain other points in New England, New York, New Jersey and Pennsylvania. (R. 12, 39-40, 144-45)

Gilbertville Co. is a Massachusetts corporation domiciled at Gilbertville, Massachusetts. It is a common carrier by motor vehicle in interstate commerce authorized to carry general commodities over regular and irregular routes within Massachusetts and over irregular routes between certain points in Massachusetts and other points in New York, New Jersey, Connecticut and Rhode Island and to carry specified commodities over some regular and some irregular routes among certain points in New England, New York, New Jersey and Delaware. (R. 12, 40-42, 154-61)

On December 20, 1955, two and a half months after the application was filed, the ICC, acting under section 5(7) of the Interstate Commerce Act, initiated an investigation to determine whether control and management of the two carriers in a common interest had already been effectuated in violation of section 5(4) of the Interstate Commerce Act. The respondents named in the investigation proceeding were the two corporate and two individual applicants and, in addition, Kenneth A. H. Nelson, who is president, treasurer and a director of Gilbertville Co. and the beneficial owner of all of its stock, and Greta C. Carlson, who is vice-president, a director and the minority shareholder of Nelson Co. (R. 181-82, 195-96, 216, 444)

Proceedings on the application and proceedings on the investigation, numbered respectively MC-F-6099 and MC-F-6178 on the dockets of the ICC, were consolidated for hearing and decision. (R. 182) The two proceedings were further commingled in the Commission's Report, for the decision in the investigation proceeding eventually became the sole reason for denial of the application. (R. 21-23)

After a lengthy hearing held in September 1956, the Examiner concluded that the application should be granted,

thus rendering the investigation moot: He found that "the case in hand appears to be on the borderline" with respect to the alleged violation of section 5(4) (R. 64), but, citing the statutory conclusive presumptions of sections 5(5) and 5(6) of the Interstate Commerce Act (R. 63-64), he held that control and management of Nelson Co. and Gilbertville Co. in a common interest "were effectuated" and "are *presumably* continuing." (R. 64; accord, R. 70) (Emphasis added.) Nevertheless he found that the proposed merger should be approved pursuant to section 5(2) because it would be in the public interest. (R. 78) The Examiner expressly found that the merger would not be harmful to competition (R. 74-76),[2] would not adversely affect employees (R. 78), and would result in substantial savings (R. 76) and, on the basis of his personal observation of the individual applicants in the hearing before him, he further found that the applicants were not unfit:

> In the case at bar, there is no evidence of extensive or flagrant violations of either the act or the regulations. The violations shown and the circumstances in which they occurred do not establish a persistent disregard for regulation. Rather, they appear to be the result in some cases of ignorance of the requirements, and in others of a degree of carelessness and not wilfulness. *The principals are youthful and are of such caliber that their experiences at the hearing herein can be expected to make them more conscious of and responsive to regulation.* They earnestly deny that what has been done in respect of Gilbertville and Nelson amounts to effectuation of control in a common interest and on this record their view on that

[2] Gilbertville Co. and Nelson Co. are both small carriers, especially compared to the large carriers and groups of carriers with whom they must compete. (R. 53-60, 76)

point cannot be said to be wholly groundless. Such control is not the result of any one act or transaction, but is the result of an evolution and accumulation of acts, transactions and practices, the ultimate consequence of which may not be readily obvious to the layman. *A finding of unfitness by reason of violations is not warranted.*" (R. 72-73) (Emphasis added.)

Division 4, by a two-to-one decision, also held that section 5(4) had been violated, although it never even cited the presumptions of sections 5(5) and 5(6); instead, Division 4 based its "finding in this respect . . . on the entire chain of circumstances revealed by the record". (R. 91) Ignoring the Examiner's finding of fact that the applicants were not unfit (although it had adopted the Examiner's factual statements "as our own" (R. 83)), Division 4 denied the section 5(2) application because "a violation of the law should not be rewarded, . . . existing carriers endeavoring faithfully to comply with the law should be encouraged and protected" and "violations of the law and of the regulations should not be 'blessed' by approval". (R. 92-93) Division 4 ordered the respondent to "terminate the violation of the provisions of section 5(4)". (R. 94)

The Commission recalled the proceedings from Division 4 after they were reopened on appellants' petition for reconsideration. In the resulting Report, to which four of the eleven Commissioners agreed,[3] the Commission relied upon the conclusive presumptions of sections 5(5) and 5(6):

> "*Considering all facts of record*, we are of the opinion, and find, that Kenneth Nelson was affiliated

[3] Four of the eleven members of the Commission constituted the majority; another concurred only in the result. Three Commissioners dissented and another who had dissented from the decision of Division 4 was among the three who did not participate in the full Commission's decision. (R. 24, 93)

> with Nelson [Co.] within the meaning of section 5(6) at the time he purchased the stock of Gilbertville [Co.] and that the conclusive presumption of section 5(5) applies; we affirm the findings in the prior report, and in the report of the examiner, that the control and management of Nelson [Co.] and Gilbertville [Co.] in a common interest has been effected and is continuing in violation of section 5(4) of the act." (R. 21) (Emphasis added.)

Then the Commission, adopting the language used by Division 4, held that the section 5(2) application must automatically be denied because section 5(4) had been violated. (R. 21-23) However, the Commission's order (R. 25-26) not only reinstated all the terms of Division 4's order, including the requirement that the respondents "terminate the violation of section 5(4) of the Interstate Commerce Act," but also

> "*further ordered*, That the said respondents be, and there are hereby, required to divest themselves of any and all interest which they may have in the capital stock of Gilbertville Trucking Co., Inc. . . ." (R. 26)

The Report of the Commission contains not a single word of justification or explanation of that addition.

After both a petition for reconsideration and a petition suggesting an alternative to the divestiture ordered had been summarily denied by the Commission, the appellants filed their Complaint seeking judicial review by the United States District Court for the District of Massachusetts, whereupon, on appellants' petition, the Commission postponed the effective date of its order. The appellants urged in the District Court, as they had urged before the Commission, that the Commission's decision was inconsistent

with the relevant provisions of both the Administrative Procedure Act and the Interstate Commerce Act and wholly without support either by adequate basic findings or by substantial evidence on the whole record.

The District Court rejected each contention: First, after making certain *de novo* findings of facts in what it called a "syllabus", the District Court copied from defendants-appellees' brief "in full the essential portion of the text" of the Commission's Report "with the supporting transcript references conveniently supplied by defendants". (R. 115) The District Court held that the Commission made sufficient findings and that the Commission's statements were "supported by evidence". (R. 121) Secondly, appraising its *de novo* findings of fact as well as the Commission's statements, the Court held that the ICC's ultimate conclusion that section 5(4) was violated is "inevitable to an unprejudiced, sophisticated mind" and affirmed that ultimate conclusion. (R. 122-23) But, although the Commission had relied upon the conclusive presumptions of sections 5(5) and 5(6), the District Court's "reasoning does not . . . require resort to any legislatively enacted definitions or presumptions." (R. 123) Finally, according to the District Court, no findings or reasoning were necessary to support the divestiture order (R. 125), and denial of the section 5(2) application merely because a section 5(4) violation had been found was "a clearly proper exercise of a delegated discretionary authority." (R. 126)

Further facts are stated hereinafter where they are necessary to the argument.

Summary of Argument

1.a. The Commission's decision was inadequate because it did not contain the basic findings and reasoning which have been made fundamental requirements of administrative action by statute and by numerous decisions of this Court. Administrative Procedure Act §8(b); *Florida* v. *United States*, 282 U.S. 194, 215; *United States* v. *Chicago, M., St. P. & Pac. R.R. Co.*, 294 U.S. 499, 504-05, 510-11. The Commission thus failed to articulate the basis of its decision as to two critical issues of fact and law: (1) The Commission's conclusion that appellants had violated section 5(4) of the Interstate Commerce Act was presumed from its ultimate finding that Kenneth was "affiliated" with Nelson Co. within the meaning of section 5(6) of the Act. (R. 21) But that ultimate finding of affiliation had to be premised on the existence at a certain time of the kind of "relationship" between Kenneth and Nelson Co. specified by section 5(6), and the Commission neither stated what "relationship" it thought existed nor gave any indication of what facts or reasoning led it to its ultimate finding of affiliation. (2) Section 5(7) of the Interstate Commerce Act gave the Commission authority to issue a remedial order only to prevent the "continuance" of a violation of section 5(4). The Commission's formal recitation that the violation which it found was "continuing" is completely without the support of any basic findings or reasoning. (R. 21)

b. The District Court not only failed to remand the case to the Commission for a statement of necessary basic findings and reasons, but it exceeded its limited role of judicial review, see *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 87-88, in refusing to rely on section 5(6) (R. 123), as the Commission had done (R. 21), and

thus deciding the case upon grounds different from those relied upon by the Commission, by making certain findings of its own which were, in part, inconsistent with those made by the Commission (R. 115-116) and by disregarding as "trivial," irrelevant, "innocent," and "ambiguous" (R. 121-22) certain findings upon which the Commission may have relied.

2. The Commission disregarded the Interstate Commerce Act in concluding that its finding of a section 5(4) violation required automatic denial of the appellants' application for merger approval. (R. 21-23). Applications are to be approved if they are found to be "consistent with the public interest." (§ 5(2)(b)). As this Court has held, the National Transportation Policy is the Commission's guide to the public interest, *Maislan Trucking Co. v. United States*, 321 U.S. 67, 82; and section 5(2)(c) of the Act also lists certain "considerations" "among others" to which the Commission is required to "give weight" in determining the public interest. The Examiner applied the statutory standards, and his basic findings clearly demonstrated that the merger would be in the public interest (R. 74-78); but the Commission ignored both the National Transportation Policy and the mandatory "considerations" in denying the application (R. 21-25), this plainly exceeding its authority. See, e.g., *Interstate Commerce Commission v. J-T Transport Co., Inc.*, 368 U.S. 81, 89. Moreover, the Commission's making a finding of violation of section 5(4) an absolute bar to approval of a section 5(2) application both irrationally ignores the distinction between a willful and an innocent "law violation" and tends to defeat the overall policy of section 5 of the Act.

3. The Commission gave no "clear indication" that its order that Kenneth divest himself of his Gilbertville stock (R. 26) was based upon a true exercise of discretion that

is, deliberation and judgment upon all pertinent factors. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 197. Although the requirement that an administrative order be issued only pursuant to an exercise of discretion is underscored in this case by the provision in section 5(7) of the Interstate Commerce Act that remedial orders must be "necessary," the Commission's Report included no findings or reasons with respect to this important issue of necessity. It is well settled that a harsh administrative order, such as divestiture, can be justified only where there is a clear showing that alternative remedies have been considered and found wanting. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613; see, e.g., *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 602-603; *cf. United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316, 327. The Commission's order that Kenneth strip himself of his entire interest in the company in which he has invested 9 years of his life as the sole owner and operator, in circumstances making a fair price impossible, is uniquely drastic. And apparently effective alternatives, such as an order requiring Kenneth to sever whatever relationship underlay the Commission's finding that he was affiliated with Nelson Co., were obviously available.

4. Finally, not only is the record without substantial evidence to support the Commission's decision or a number of its findings, but the District Court did not even purport to find the Commission's decision or findings supported by substantial evidence on the whole record.

Argument

I. In Deciding Critical Issues as to Violation of Law and Continuance Thereof, the Commission and the District Court Disregarded the Elementary Principles Requiring That the Commission's Decision Disclose the Grounds Upon Which It Was Based and Be Judicially Reviewed Upon Those Grounds.

A. *The Commission failed to state basic findings or reasoning adequate to disclose the grounds for its ultimate findings on those issues.*

The Commission's Report in the present case failed to state any basic findings or reasoning supporting or explaining its decision as to two crucial issues. The Report does not disclose how or why or on what factual basis, (if any) the Commission reached its ultimate findings or conclusions (1) that Kenneth was "affiliated" with Nelson Co., so that appellants were guilty of a section 5(a) violation and (2) that the violation was a continuing one. Thus the Commission's decisions failed to satisfy minimum standards of articulation and explication established by this Court and the Administrative Procedure Act.

This Court has "repeatedly emphasized the need for clarity and completeness in the basic or essential findings on which administrative orders rest. *Florida v. United States*, 282 U.S. 194; *United States v. Baltimore & O. R. Co.*, 293 U.S. 454; *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475." *Colorado-Wyoming Gas Co. v. Federal Power Commission*, 324 U.S. 626, 634. "For the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review." *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 94. These fundamental principles have been codi

fied in section 5(6) of the Administrative Procedure Act, which requires that every decision of the Commission "include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record."[14]

I. Whether the respondents were guilty of effectuating "control or management in a common interest" of two carriers was a fundamental issue of fact and law in the present case. Yet the only clue to the Commission's reasoning on that fundamental issue is one abrupt, conclusory sentence: "Considering all facts of record, we are of the opinion, and find, that Kenneth Nelson was affiliated with Nelson within the meaning of section 5(6) [of the Interstate Commerce Act] at the time he purchased the stock of Gilbertville, and that the conclusive presumption of section 5(5) applies; we affirm the findings in the prior report, and in the report of the examiner, that the control and management of Nelson and Gilbertville in a common interest has been effected . . . ." (R. 21)

By working backwards and examining the language of section 5(5), a portion of the Commission's reasoning may be deciphered: The last clause of the quoted sentence (the conclusion that "control and management . . . in a common interest has been effected") is the inevitable result of "the conclusive presumption of section 5(5)", for section 5(5)(b) provides that "any transaction shall be deemed to accomplish or effectuate the control, management in a common interest of two carriers — . . . if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier . . . ." Thus (it may be inferred) the Commission referred

[14] "There can be no doubt that the Administrative Procedure Act applies to proceedings before the Commission". *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 192.

to Kenneth's purchase of all of the stock of Gilbertville Co., which was certainly a "transaction" placing Kenneth in control of Gilbertville Co. because of [illegible] Kenneth was "affiliated" with Nelson Co. at the time of that purchase "the conclusive presumption of section 5(6) applies" and section 5(4) is therefore deemed to have been violated."

But the Report gives no hint as to how and why the Commission reached the all-important ultimate finding that Kenneth was "affiliated" with Nelson Co. As Chief Judge Magruder said in *New York Central R. Co. v. United States*, 99 F. Supp. 394, 401 (D. Mass. 1951), *aff'd*, 342 U.S. 890,

> "[A]n ultimate finding is not enough in the absence of a basic finding to support it. . . . And the basic findings should be clearly stated and identified as such, so that the reviewing court will not be groping in the dark as to the grounds for the Commission's ultimate conclusion."

Basic findings may not be inferred from ultimate findings. E.g., *Colorado-Wyoming Gas Co. v. Federal Power Commission*, 324 U.S. 626, 634; *Florida v. United States*, 282 U.S. 194, 215.

Section 5(6) says that "a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier, . . . it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier." Whether the requisite relationship, and therefore "affiliation," existed is clearly an issue of fact as to which the Commission's Bureau of Inquiry and Compliance (hereinafter called the Bureau) had the burden of proof. See *Hearings on H.R. 9073 Before the House Committee on Interstate and Foreign Commerce*, 72d Cong.,

1st Sess. at 33-34 (1932); Administrative Procedure Act, 7(c). Thus, to have found Kenneth "affiliated" (as it did), the Commission should first have found that the Bureau had proved the existence of a "relationship" between Kenneth and Nelson Co. at the time Kenneth bought the stock of Gilbertville Co., which would have made it "reasonable to believe that the affairs of" Gilbertville Co. would be managed in the interest of Nelson Co. But no basic finding of that kind of "relationship" is "clearly stated and identified as such" in the Commission's Report. The parties and this Court are truly left "groping in the dark" for the "relationship" (if any) which the Commission may have thought was proved by the Bureau.

Such "groping in the dark" is particularly difficult in the present case, first, because the Commission's ultimate finding that "Kenneth Nelson was affiliated" is appended to a two-page recitation of miscellaneous factual statements (R. 19-21), wherein many facts which, as the District Court held (R. 121-22), are "trivial to the point of demonstrable irrelevance", "innocent" and "ambiguous" are indiscriminately commingled with statements which, as will be shown (see pp. 47-54, *infra*), are not supported by substantial evidence on the whole record, and, secondly, because the Commission did not limit itself to the factual statements on these two pages, but rather purported to make that ultimate finding upon "all facts of record" (R. 21).[5] Further-

[5] Sweeping statements that the Commission examined "all the evidence" or "all facts" are not satisfactory substitutes for basic findings. *See Beaumont, Sour Lake & Western Ry. Co.* v. *United States*, 282 U.S. 74, 86; *Atlanta & St. Andrews Bay Ry. Co.* v. *United States*, 101 F. Supp. 193 (M.D. Ala. 1952). "This Court will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended for narrative findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order." In the absence of a finding of essential basic facts, the order cannot be sustained. *Florida* v. *United States*, 282 U.S. 194. Recently this court has repeated the

motor, in the present case such "groping in the dark" must also be fruitless, for no such "relationship" can be found. Nowhere in the Commission's factual recitation or elsewhere in the Report is there any indication of a "relationship" which would support the assertion that "Kenneth Nelson was affiliated".[7]

In fact, the Commission's express findings (R. 19) show that Kenneth had ceased to be an officer or director or stockholder of Nelson Co. long before he bought the stock of Gilbertville Co.[8] and that even the connection between Kenneth and Nelson Co. as, respectively, free lance tariff consultant and client had ended by March 1, 1953, before Kenneth even signed the contract to buy Gilbertville Co.'s stock.[8] Upon "all facts of record", the only relationship

suggestion that lack of express findings by an administrative agency may be supplied by implication." *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 295 U.S. 193, 201-02; see also *Inland Motor Freight v. United States*, 60 F. Supp. 520, 521 (E.D. Wash. 1945).

[7] In this case it cannot be said even that there "lurk in this report phrases or sentences suggestive" of the required "relationship". *United States v. Chicago, M., St. P. & Pac. R.R. Co.*, 294 U.S. 499, 510.

[8] Shortly after the death of Mrs. Linnea Nelson in 1950, four of her seven children, including Kenneth, resigned their respective positions with Nelson Co., sold their stock, and went their separate ways. Specifically, Kenneth resigned and sold all his stock (including the shares he expected to receive from his mother's estate) in September 1951. (R. 188-98, 253-62, 272-76, 282-83, 290-92.) Kenneth's contract to buy the stock of Gilbertville Co. was dated March 2, 1953 and signed March 3, 1953, and the transaction was not consummated until July 24, 1953. (R. 308, 667-70.)

[8] Moreover, regardless of the dates involved, it would scarcely be "reasonable to believe"—indeed, it would be incredible—that Kenneth would manage the affairs of Gilbertville Co., of which he was sole equitable owner and in which he had invested substantial amounts of his own money and money borrowed on his personal credit (R. 202-214, 328-337), in the interest of Nelson Co., in which he had no financial interest. (R. 198). Furthermore, whereas a free-lance tariff consultant is an independent contractor, see, *e.g.*, *State v. E. J. Dodd & Co.*, 96 Atl. 695, 640 (R.I. 1916); *Gulf & Southern Transportation Co., Inc., — Extension — Century, Florida*, 71 M.C.C. 1, 2 (1957); see also R. 105-06, 184, 242-43, 276, 504, the normal meaning of "affiliated" suggests dominant and subordinate roles. And in the con-

which Kenneth had to Nelson Co. "at the time he purchased the stock of Gilbertville" was a blood relationship—Kenneth was (and still is) a brother and half brother, respectively, of the three owners of Nelson Co. But surely the Commission has not *sub silentio* laid down a rule of law that whenever a man is a brother of the owners of a carrier he is "affiliated" with that carrier. Indeed, in light of the legislative history of sections 5(5) and 5(6), which were aimed at the giant railroad holding companies of the 1930s,[9]

---

text of railroad-motor carrier mergers, "affiliated" as used in section 5(6) has apparently been understood to imply subordination. Both this Court and the Commission have paraphrased the expression "a carrier by railroad . . . or any person which is *controlled* by such a carrier, or *affiliated* therewith . . ." (§5(2)(b)) as "rail carriers or their affiliates," and have referred to the proviso containing that language as an example of the strong Congressional policy "against railroad invasion of the motor carrier field". *American Trucking Assocs.* v. *United States*, 364 U.S. 1, 6, 7. *See* also *American Trucking Assocs.* v. *United States*, 335 U.S. 141, 147; *Navajo Freight Lines, Inc.* v. *United States*, 186 F. Supp. 377, 382 (D.D.C. 1960). Compare S. Rep. No. 87, 73d Cong., 1st Sess. at 9 (1933) (Pennsylvania Railroad Company "dominated" its "affiliate", the Pennroad Company).

[9] *See*, e.g., S. Rep. No. 87, 73d Cong., 1st Sess. at 9 (1933); H.R. Rep. No. 193, 73d Cong., 1st Sess. at 19 (1933); *Hearings on H.R. 9059 Before the House Committee on Interstate and Foreign Commerce*, 72d Cong., 1st Sess. at 10 (1932). The legislative history also refers to other "ingenious legal devices." S. Rep. No. 87, *supra*, p. 9; H.R. Rep. No. 193, *supra*, p. 16; 77 Cong. Rec. 4258. One recurrent example in the legislative history which was typical of the powerful and complex corporate structures built up to gain control of elaborate railroad systems was the Allegheny Corporation, a holding company at the focal point in the so-called VanSweringen system. The best insight is gained by reference to the detailed chart opposite p. 878 of Part II of H. R. Rep. No. 2789, 71st Cong., 3d Sess. (1931), but even a summary of one small part gives the flavor of the legislative history. Using the Erie Railroad as the carrier controlled, control was acquired in the following manner: I. Stock of the Erie was owned by the Geneva Corporation (.3572%), the Virginia Transportation Corporation (23.3609%) and the Allegheny Corporation (7.0463%). II. A. (1) The Geneva Corporation was owned by the Vanness Company (100%). (2) The Vanness Company was owned by the VanSweringen brothers, as partners (80%). B. (1) The Virginia Transportation Corporation was owned by the Chesapeake & Ohio Ry. (100%). (2) The Chesapeake & Ohio was owned by (a) the VanSweringens, as partners (.0024%), (b) the Allegheny Corporation

the notion that fraternity might be such a "relationship" as to make Kenneth an affiliate[10] of Nelson Co. is quite incongruous.

2. In entering its remedial order and, in particular, in ordering Kenneth to dispose of the stock of Gilbertville Co., the Commission purported to act pursuant to section 5(7) of the Interstate Commerce Act, which empowers the Commission, if it "*finds* after such investigation that such person *is violating*" section 5(4), to order "such action as may be necessary, in the opinion of the Commission, *to prevent continuance* of such violation." (Emphasis added.) Obviously section 5(7) only authorizes the Commission to prevent further continuance of a continuing violation; it does not permit the Commission to punish, redress, or otherwise remedy a past violation which has been voluntarily termi-

(.0063%), and (c) the Chesapeake Corporation (54.3817%). (3) The Chesapeake Corporation was owned (a) by the VanSweringens, as partners (.0020%), (b) the New York Chicago & St. L. R.R. (.0459%) and (c) the Allegheny Corporation (70.9211%). (4) The New York, Chicago & St. L. R.R. was owned (a) by the Allegheny Corporation (49.5717%) and (b) by the VanSweringens, as partners (.0006%). C. (1) The Allegheny Corporation was owned by the Vanness Company (2%) and the General Securities Corporation (39.75%). (2) The General Securities Corporation was owned by the Vanness Company (56%) and the VanSweringens, as partners (39%). Many of the corporations here named were also tied to each other and to others in achieving control of other railroads.

[10] The concrete example of an "affiliate" which predominates in both the voluminous three-part report, H.R. Rep. No. 2789, 71st Cong., 3d Sess. (1931), and the extensive *Hearings on H.R. 9059 Before the House Committee on Interstate and Foreign Commerce*, 72d Cong., 1st Sess. (1932), was the relationship which the Pennroad Company bore to the Pennsylvania Railroad Company. Pennroad was organized by the managers of the Railroad, and was tied to the Railroad by (1) 8 of 11 directors who occupied or had occupied positions as directors or officers of the Railroad; (2) a 10-year voting trust of all of the common stock of Pennroad of which the three trustees were initially directors or officers of the Railroad; and (3) the fact that voting trust certificates were offered only to stockholders of the Railroad (and one investment advisory firm). In addition, many railroads were owned jointly, directly or indirectly, by the Railroad and Pennroad. H.R. Rep. No. 2789, *supra*, Vol. II, at 653-714; *Hearings*, *supra*, at 33-34.

nated or has otherwise ceased. In other words, although section 5(4) forbids both the effectuation or accomplishment of control or management in a common interest and the maintenance or continuance of such control or management after it has been effectuated, Congress was well aware of the distinction between effectuation and continuance and deliberately restricted the Commission's powers pursuant to section 5(7) to the prevention of continuing violations. See H. R. Rep. No. 193, 73d Cong., 1st Sess. at 16, 17 (1933); S. Rep. No. 87, 73d Cong., 1st Sess. at 9, 10 (1933).[11]

Whether the violation the Commission found was a continuing one is thus one of the "material issues of fact" as to which section 8(b) of the Administrative Procedure Act clearly required a statement of findings and "the reasons or basis therefor." Indeed, it is an issue open to grave doubt: The Commission's ultimate finding of a violation was simply presumed from an assertion (unsupported, as has been shown) of "affiliation" at a specified time — "at the time he [Kenneth] purchased the stock of Gilbertville". (R. 21) If the supposed "relationship" necessary to support an ultimate finding of "affiliation" was severed at some later time, the violation would not be continuing.[12]

---

[11] In this respect section 5(7) is unusual, if not unique, among grants of administrative remedial power. Compare, e.g., National Labor Relations Act § 10(c), as amended, 61 Stat. 147 (1947), 29 U.S.C. § 160 (c) (order issued if Board finds any person "has engaged in or is engaging in any such unfair labor practice"); Federal Trade Commission Act § 5(b), as amended, 52 Stat. 112 (1938), 15 U.S.C. § 45(b) (complaint issued if FTC believes any person "has been or is using any unfair method of competition" and order issued if FTC finds that method of competition prohibited).

[12] Surely private parties, prior to Commission action, can, and should, terminate any violation voluntarily. For example, suppose that when X purchases the stock of A Trucking Co. X has some "relationship" to B Trucking Co. but X, in good faith thinks that "relationship" does not make it "reasonable to believe" that "the affairs of any carrier" which X acquires "will be managed in the interest of" B Trucking Co. and X therefore does not think he is "affiliated" with B Trucking Co. And suppose that X's attorney or a Commission investigator or

Yet the Commission's Report contains no findings with respect to continuance other than its ritualistic ultimate finding (R. 23-24), which clearly is not enough. See cases cited at p. 15 *supra*. Nothing is added by the Commission's statement that "we affirm the findings in the prior report, and in the report of the examiner, *that* the control and management of Nelson and Gilbertville in a common interest has been effected and is continuing in violation of section 5(4) of the act." (R. 31) (Emphasis added.) That statement is merely an ultimate finding which affirms previous ultimate findings. Nor were there adequate basic findings with respect to continuance in either the Prior Report or the Examiner's Report: Division 4 made no finding of continuance at all, but merely purported to "concur in the examiner's conclusion." (R. 91) And the Examiner was unable to find, on the basis of evidence pertaining to the years 1953 through 1955, that a violation was continuing in 1956; he merely *presumed* it. (R. 64, 70)[13]

someone later suggests to X that he might well be found to be "affiliated" with B Trucking Co. and therefore in violation of the law. Such a violation would be terminated upon X's severing his "relationship" with B Trucking Co., and certainly X ought to be encouraged to do so. After X's voluntary severance of his "relationship" with B Trucking Co., the Commission would have no jurisdiction to enter a remedial order pursuant to section 5(7). Moreover, in the present case, in contrast to the foregoing suppositious one, the Commission's findings show that Kenneth severed every conceivably relevant relationship with Nelson Co. prior to his purchase of the stock of Gilbertville Co. See notes 7 & 8, *supra*.

[13] It is clear that a finding of the continued existence of illegal activity may not be presumed but must be based upon actual facts. See, e.g., *Amalgamated Meat Cutters & Butcher Workmen* v. *National Labor Relations Board*, 352 U.S. 153, 156-57 (Frankfurter, J. concurring); cf. *Bollenbach* v. *United States*, 326 U.S. 607. However, in the present case no finding as to continuance was necessary to the Examiner's Report, for he held that the section 5(2) application should be approved and no remedial order should be entered. See *Central of Georgia Ry. Co. Control*, 307 I.C.C. 39-40 (1958) ("in view of the finding in the application proceeding, . . . it was not necessary to determine whether the violation was continuing").

B. *The District Court erred by deciding the issues as to violation of law upon findings of fact and a legal theory different from those relied upon by the Commission.*

The District Court in the present case disregarded its special role and responsibilities as a reviewing court pursuant to section 10 of the Administrative Procedure Act and usurped fact-finding and decision-making functions committed by Congress to the Commission. Because, as has been shown, the Commission's decision in the present case lacked necessary basic findings and reasoning as to two fundamental issues, those issues could not be subjected to meaningful judicial review and the District Court was required to set aside the Commission's decision and remand the case to the Commission. See, e.g., *United States* v. *Chicago, M., St. P. & Pac. R.R. Co.*, 294 U.S. 499. But, instead, the District Court (1) disregarded some facts which the Commission apparently had considered, (2) made its own findings and assumptions of fact which were inconsistent with the Commission's findings, and (3) relied upon a legal theory different from the theory upon which the Commission's decision was based. The District Court then purported to affirm "the ultimate finding made by the I.C.C. and the derived legal conclusion announced by the I.C.C." (R. 122), not because they were supported by basic findings of fact, substantial evidence and sound reasoning, but because the District Court, upon a different view of the facts and a different legal theory, found the Commission's "ultimate finding" and "conclusion" "not merely reasonable but inevitable to an unprejudiced, sophisticated mind." (R. 122-23)

The District Court thus violated the principles enunciated by this Court in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 87, 88, and reiterated fre-

quently, see, e.g., *American Trucking Assocs. v. United States*, 364 U.S. 1, 13-14, that "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based" and that "a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."

1. As the District Court correctly held, the two-page factual recitation in the Commission's Report included some matters (although the District Court did not specify which ones) which were "trivial to the point of demonstrable irrelevance" and "some innocent conduct, or conduct of ambiguous nature." (R. 121-22) Therefore, inasmuch as the Commission in no way had indicated what weight it had attached to those matters, the District Court was clearly required to remand the case to the Commission for reconsideration and decision without taking into account the matters which the District Court rejected as "trivial", irrelevant, "innocent" or "ambiguous". See *Communist Party v. Subversive Activity Control Board*, 351 U.S. 115; *Carey v. Civil Aeronautics Board*, 275 F.2d 518, 522 (1st Cir. 1960); *cf. Colorado-Wyoming Gas Co. v. Federal Power Commission*, 324 U.S. 626, 634. By refusing to remand the case on the grounds that the "trivial" and irrelevant items were "imponderable" or "inconsequential" or "a few minor strings at points of less than crucial significance" (R. 121, 122) and that "a reasonable reviewer would not conclude that the deletion of all reference to that conduct would alter or modify the I.C.C.'s ultimate and essential finding" (R. 122), the District Court plainly was, in the words of the *Chenery* case, trying to make "a judicial judgment . . . do service for an administrative judgment."

2. Perhaps because of the lack of necessary basic find-

ings and reasoning in the Commission's Report, the District Court began its discussion of the present case by setting forth, in what it called "a syllabus", the basic facts it deemed most significant. (R. 115-16) However, more than half of the statements in that "syllabus" are demonstrably inconsistent with the facts found by the Commission. The following examples are typical:[14]

First, the District Court asserted in the "syllabus" that "if he [Kenneth] had clients other than Nelson Co. they were not shown. Moreover, in his work for Nelson his duties (properly inferrable from his title, his rate of compensation, and miscellaneous specific minor incidents,) trench upon administrative or executive rather than strictly independent professional advisory functions." By that single assertion the District Court contradicted (1) the Commission's express finding that Kenneth was "a 'free lance' tariff consultant" (R. 19) — that is, an independent contractor practising a profession which is well established within the transportation industry where the Commission is expert — and (2) undisputed evidence that Kenneth had no "rate of compensation" but rather was paid as independent professionals are normally paid — according to

---

[14] Some of the other matters as to which the "syllabus" contradicted both the Commission's Report and the undisputed evidence were the following: (1) The "syllabus" "shows a close business relationship between Kenneth A. H. Nelson, his mother, and her six other children" by saying, "Originally they were all associated as shareholders in the Nelson Co." (R. 115) But in fact three of the seven children became shareholders only when "Mrs. Nelson died in 1950 and her stock . . . was devised, 42 shares each". (R. 19, 186-88) (2) The "syllabus" finds, "In 1952 Kenneth was still the owner of 92 of the 500 shares of the Nelson Co." (R. 115), whereas actually Kenneth never owned more than 50 shares of Nelson Co. stock and owned *no* such stock at any time in 1952. (R. 19, 188-94) (3) The statement in the "syllabus" that "At four . . . terminals [other than the New York terminal], . . . Gilbertville Co. was a sub-lessee" (R. 116) contradicted the Commission's correct finding that such subleases existed at only three terminals other than New York. (R. 20)

statements for fees which he rendered from time to time. (R. 242-43) Moreover, the District Court's assertion was pure speculation, without any basis in fact. The record contains neither any finding nor even any evidence of "specific, minor incidents" while Kenneth was a free lance tariff consultant, or of anything else which might indicate that Kenneth had "duties" or support any logical inference as to such "duties". It is significant, and typical of the vagueness of the District Court's opinion in the present case, that the "syllabus" merely characterizes the "duties" and the District Court does not indicate anywhere in its opinion what "duties" it thought were "inferrable".

Second, the District Court in its "syllabus" contradicted the Commission's express finding that Kenneth was a free lance tariff consultant only until "March 1, 1953". (R. 19; see p. 17 and note 8, *supra*) The Commission's finding is never mentioned by the "syllabus", which instead dwells at length upon a few words of ambiguous testimony which obviously were discredited by the Commission[15] to the effect that "some of the services" of Kenneth as a free lance tariff consultant for his client Nelsen Co. "were performed after Kenneth's acquisition of the stock of Gilbertville Co. (Tr. 427), that is, after March 2, 1953." (R. 116) The District Court then relied upon that testimony to reach an independent conclusion that section 504 was sto-

[15] The Commission's refusal to credit these few words was certainly correct: That the witness was only making a guess appears from the words "would have to be" in the very statement the District Court relies upon (R. 361) and also from the witness' admitted lack of knowledge and confusion about the subject. (R. 358-64) Moreover, his guess was based solely upon data concerning Kenneth's annual income. (R. 278-82) Such data cannot support any inference as to when during a year money is received; and the time Kenneth received his fees depended upon when he rendered statements, not upon when he rendered services. (R. 242-43) It is significant that, whereas Kenneth was a free lance tariff consultant for four months in 1951, he received no fees in 1951.

lated: "the whole convergence begins with the purchase of shares in a second company made by an individual at a moment when he is not shown to have severed a relationship to the arterial traffic nerve of the first company." (R. 122).

As has been demonstrated by each of those assertions the District Court squarely contradicted the findings of the Commission. Moreover, those assertions are also inconsistent with the Commission's findings—and clearly erroneous—because they are based upon the District Court's mistaken view of the burden of proof. In each of the instances just cited, as well as elsewhere in the "syllabus",[16] the District Court patently has inferred that because certain things "were not shown", the facts if "shown" would have been harmful to the appellants. See *Interstate Commerce Commission* v. *J-T Transport Co., Inc.*, 368 U.S. 81, 90. That inference by the District Court is necessarily inconsistent with the facts as the Commission viewed them, for section 7(c) of the Administrative Procedure Act specifies that "the proponent of a rule or order shall have the burden of proof." The Bureau was the proponent in the investigation proceeding, and Commission counsel even conceded that the Commission had the burden of proving that Kenneth did not have other clients (if that had been the fact). (R. 106) Therefore when the Commission viewed the facts it must have drawn the opposite inference—that facts not shown were consistent with the innocence of the appellants.

3. The finding of ultimate fact and the legal theory upon which the District Court based its decision of the issues of

[16] "Some items of expense are shared upon a set formula, not shown to be other than arbitrary." (R. 116) There was no evidence, or even any suggestion, that whatever apportionment the "syllabus" refers to (apparently that of telephone service) was disproportionate, and the Bureau clearly would have had the burden of proving the apportionment questionable.

violation of law were entirely different from those relied upon by the Commission. As has been shown (pp. 14-15, *supra*), the Commission's decision in the present case was based upon an ultimate finding "that Kenneth Nelson was affiliated with Nelson within the meaning of section 5(6) at the time he purchased the stock of Gilbertville" and "the conclusive presumption of section 5(5)". But the District Court specifically disclaimed reliance upon the grounds the Commission had used by stating that its "reasoning does not . . . require resort to any legislatively enacted definitions or presumptions." (R. 123)

The difference between the rationale of the District Court and the rationale of the Commission is fundamental. Section 5(4), read alone, prohibits "control or management in a common interest of any two or more carriers". Whether that prohibition is violated is a question of fact; it is violated only if common control is found, by some means or devices to have been actually effectuated. Sections 5(5) and 5(6), however, in effect prohibit the acquisition of a carrier by any person who has a "relationship" with another carrier which makes it "reasonable to believe" certain things will happen. In other words, there is a violation by reason of section 5(4) alone if, and only if, certain facts actually exist, whereas there is a violation by reason of sections 5(5) and 5(6) if, and only if, certain things can be predicted.

Although Congress, as a drafting technique, expressed the sections 5(5) and 5(6) prohibition by creating in section 5(5) a conclusive presumption of a section 5(4) violation based on a definition enacted in section 5(6), it can by no means be said that the sections 5(5) and 5(6) prohibition is the same as the section 5(4) prohibition. It certainly may not be lightly assumed that Congress would insert and maintain repetitive sections in the Interstate Commerce Act. Moreover, the legislative history makes it

clear that Congress intended that the two prohibitions be different. Both congressional reports state that the provisions which are now sections 5(5) and 5(6) "are necessary" in addition to what is now section 5(4). S.Rep. 87, 73d Cong., 1st Sess. at 9 (1933); H.R.Rep. 193, 73d Cong., 1st Sess. at 16 (1933). The special counsel for the House Interstate and Foreign Commerce Committee, who was one of the draftsmen of the provisions which are now sections 5(4), 5(5) and 5(6) and was their principal exponent in the hearings, stated that "it is the purpose of subdivision (b) [now section 5(5)] to establish as a rule of law that certain transactions which it might be argued do not come within the provisions of subdivision (a) [now section 5(4)] are to be considered as accomplishing or effectuating control or management in violation of subdivision (a) [now section 5(4)]." A number of examples of transactions which the sections 5(5) and 5(6) prohibition was thought "necessary" to reach were given in the hearings and the House Report. *Hearings on H. R. 9050 Before the House Committee on Interstate and Foreign Commerce*, 72d Cong., 1st Sess. at 32-37 (1932); H. R. Rep. 193, 73d Cong., 1st Sess. at 17 (1933) (See note 10, *supra*).

Contrasting the Commission's decision with that of the District Court in the present case illustrates the fact that the prohibition of sections 5(5) and 5(6) is, as Congress intended it to be, different from the prohibition of section 5(4). The Commission's decision, which was based on violation of the prohibition of sections 5(5) and 5(6), involved the question of ultimate fact whether Kenneth was "affiliated" with Nelson Co. when he purchased the stock of Gilbertville Co. and the issues of basic fact necessary to decide whether as of that time there was a "relationship" between Kenneth and Nelson Co. and whether that "relationship" would have made it "reasonable to believe" that the affairs of any carrier of which Kenneth acquired control would be

managed in the interest of Nelson Co.[17] On the other hand, the District Court's ground of decision involved the question of ultimate fact whether control or management in a common interest had been effectuated and the issues of basic fact implied by that question.[17] Thus, because the District Court decided the case upon a different ground instead of reviewing the Commission's order upon "the grounds, . . . upon which the record discloses its action was based" in accordance with the principle of the *Chenery* case, the Commission's crucial finding of affiliation was not subjected to judicial review by the District Court.

II. In Denying the Application for Approval of the Proposed Merger, the Commission Disregarded Mandatory Considerations Prescribed by the Interstate Commerce Act and Applied Instead a Single Arbitrary Standard.

"The congressional purpose in the sweeping revision of 5 of the Interstate Commerce Act in 1940 . . . was to facilitate merger and consolidation in the national transportation system." *County of Marin* v. *United States*, 356 U.S. 412, 416. Thus section 5(2)(b) of the Act directs the Commission to approve ("upon the terms and conditions, and with the modifications, . . . found to be just and reasonable") a proposed transaction upon finding that the transaction is within the scope of section 5(2)(a) and "will be consistent with the public interest". The National Transportation Policy declared by Congress (54 Stat. 899 (1940),

---

[17] The District Court's *de novo* review is peculiarly repugnant to an orderly administrative process in the present case, for the District Court's "affirmance" of the Commission was on a ground that the Commission itself had impliedly rejected. Division 4 decided the present case on essentially the same theory as that used by the District Court (although on quite different facts). On reconsideration, however, the Commission abandoned that ground and invoked instead the conclusive presumptions of sections 5(5) and 5(6).

p. A-1, *infra*) "is the Commission's guide to 'the public interest'.", *McLean Trucking Co. v. United States*, 321 U.S. 67, 82, and, in addition, Congress prescribed in section 5(2)(c) that the Commission, "in passing upon any proposed transaction under the provisions of" section 5(2), "shall give weight to . . . [certain] considerations, among others".

The Commission, by its decisions, has developed another criterion, usually called "fitness" of the applicants, which it has weighed in considering section 5(2) applications, and in determining "fitness", the Commission has frequently taken into account willful violations of law as evidence of "unfitness". However, as the Commission's Report in the present case stated, "the views *heretofore* followed, [were] that law violations are not necessarily a bar to approval of an application, if the public interest will best be served by approval of the transaction presented." (R. 23) (Emphasis added.) Thus, although a willful violation of law has not infrequently been a factor contributing to the denial of a section 5(2) application by the Commission after weighing "fitness" *together with other criteria*,[18] section 5(2) applications have also been granted by the Commission despite blatant violations of law, e.g., *Otto L. Hankison-Control-Mutual Trucking Co.*, 37 M.C.C. 617 (1941), and such approvals have been affirmed by the courts, e.g., *Baltimore Transfer Co. v. Interstate Commerce Commission*, 114 F.Supp. 558 (D. Md. 1953), *affirmed*, 346 U.S. 890. Moreover, "fitness" of applicants has always been a question of

[18] See, e.g., *Central of Georgia Ry. Co. Control*, 307 I.C.C. 39, 41 (1958) (proposed acquiring carrier's financial condition and effect upon service and traffic interchange weighed); *Powell-Purchase-Ramp*, 57 M.C.C. 597 (1951) (weighing a long history of criminal violations and also considering proposed vendee's unprofitable operations of rights involved under a lease); *Sellers-Control-Huckabee Transport Corp.*, 80 M.C.C. 429 (1959) (considering deterioration of proposed vendor's financial condition while controlled by proposed vendee under temporary authority).

fact involving considerations of good faith and moral character, see, e.g., *Ethel R. Eick-Control-Regal Blue Coaches, Inc.*, 56 M.C.C. 617 (1950), and applicants have been consistently held "fit" to merge pursuant to section 5(2) despite an innocent violation of section 5(4), e.g., *Masten Transportation, Inc.-Merger-Masten Trucking Co., Inc.*, 70 M.C.C. 421 (1957). Although appellants have found no court decision sustaining a denial of a section 5(2) application based on "unfitness" shown by a violation of section 5(4), appellants assume for purposes of the present case both that the Commission may properly consider "fitness" of the applicants as one factor "among others" bearing on whether a section 5(2) application should be granted and that a *willful* violation of law would be evidence relevant to a determination of "fitness."

In the present case the Examiner, in considering the section 5(2) application, weighed "fitness" together with the mandatory considerations of section 5(2)(c). He found that the proposed merger (which is undeniably "within the scope of" section 5(2)(a)) would be in the public interest and would result in a sounder common carrier and achieve substantial savings without adverse effects upon employees or competition, that "a finding of unfitness [of the applicants] by reason of violations is not warranted,"[19] and

[19] The Examiner, who personally observed the applicants both in the hearing room generally and particularly on the witness stand, expressly found that the applicants are not "unfit":

> "In the case at bar, there is no evidence of extensive or flagrant violations of either the act or the regulations. The violations shown and the circumstances in which they occurred do not establish a persistent disregard for regulation. Rather, they appear to be the result in some cases of ignorance of the requirements, and in others of a degree of carelessness and not willfulness. *The principals are youthful and are of such caliber that their experiences at the hearing herein can be expected to make them more conscious of and responsive to regulation.* They earnestly deny that what has been done in respect of Gilbertville and Nelson amounts to effectuation of control in a common interest

that the section 5(2) application should be granted. (R. 70-78)

The Commission did not question the correctness of the Examiner's findings concerning the criteria of section 5(2)(c); instead, the Commission ignored those criteria. Over the protests of one Commissioner who concurred only in the result and at least the two dissenting Commissioners who expressed their opinions (R. 24), the Commission renounced the process of weighing the considerations prescribed by section 5(2)(c) together with "fitness" and other criteria relevant to the public interest, and denied the section 5(2) application solely because a "law violation" had been found. (R. 23) The only statements in the Commission's Report apparently intended to justify the automatic denial of the section 5(2) application because a "law violation" had been found are four sentences which, after restating "the views heretofore followed" (R. 21-23), the Commission quoted and adopted from Division 4's Prior Report. Although the meaning of those four sentences is certainly less than clear, they seem to say that, "after more than 20 years of regulatory experience," "paramount public interest" can no longer warrant granting a section 5(2) application when a "law violation" has been found, and that this "more stringent approach" is designed to vindicate the principles "that a violation of law should not be rewarded [or 'blessed' by approval]" and that existing

and on this record their view on that point cannot be said to be wholly groundless." (R. 72-73) (Emphasis added.)

That finding is entitled to great respect. E.g., *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 496. Moreover, it is the only finding of fact with respect to "fitness" in the record.

No "unfitness" can be inferred from the Commission's conclusion of "law violation" in the present case, which was based upon "affiliation" and "the conclusive presumption of section 5(5)". (R. 21; see pp. 14-15, *supra*) The ultimate finding that Kenneth was "affiliated with" Nelson Co. is only a conclusion that it was reasonable to believe certain things would happen, which certainly does not imply any culpable or immoral conduct on the part of Nelson Co. or Gilbertville Co. or anyone else.

carriers endeavoring faithfully to comply with the law should be encouraged and protected."[20] In affirming the Commission's decision, the District Court said that the Commission "did no more than to refuse lawful unification to companies which it had found had precipitately and perilously effectuated a prohibited union without permission. Under some imaginable circumstances, to have granted the merger application might conceivably be in the public interest. But to deny application to formalize and strengthen a relationship already in part achieved by unlawful conduct is a clearly proper exercise of a delegated discretionary authority." (R. 126).

But the Commission's decision in the present case was

---

[20] The quoted language also remarks, "It should be emphasized that Nelson's and Gilbertville's principals are not new to transportation or to section 5 proceedings", but the fact that appellants had been involved in previous section 5(2) applications certainly does not reflect adversely on their "fitness". The applicants have never denied knowing that a merger would require section 5(2) approval; the merger agreement was expressly conditional upon such approval and recognized the Commission's power to prescribe terms, conditions or modifications pursuant to section 5(2). (R. 170-71). But knowledge that section 5(2) approval would be required for a merger does not mean that the applicants could know that, in the absence of a merger, the Commission would find Kenneth "affiliated" with Nelson Co. and "the conclusive presumption of section 5(5)" applicable. A layman cannot be expected to predict sophisticated applications of the complex provisions of sections 5(4), 5(5) and 5(6). As the Examiner said, the applicants' belief that they were innocent of any violation of section 5(4) "cannot be said to be wholly groundless" and the basis for his finding of a violation "may not be readily obvious to the layman." (R. 72-73).

Indeed, if the prior section 5(2) proceedings are relevant, their significance is in the fact that the Commission had ruled on June 16, 1954, in connection with one of the cited proceedings, that "the holding of stock by the stockholders of the L. Nelson & Sons Transportation Co. . . . and by their brother of the controlling stock in Gilbertville Trucking Co., Inc., will not result in the common control of the operations . . . and will not bring about an improper competitive situation". (R. 686-87). In light of that ruling, it certainly may not be inferred that the appellants knew, or even ought to have known, that the Commission would later hold that a violation of law had occurred in March of 1953.

actually quite the contrary of a "clearly proper exercise of a delegated discretionary authority"—it was a *refusal to exercise* the discretion Congress conferred upon the Commission. Congress gave the Commission "discretionary authority" to weigh considerations specified in section 5(2)(c) and other relevant factors and determine whether a section 5(2) application is "consistent with the public interest." By ruling in the present case that no merger, however much in the public interest, will receive section 5(2) approval if there has been a violation of law, the Commission disregarded the fundamental directive of section 5(2)(b) that a proposed transaction shall be approved if "consistent with the public interest",[21] the four mandatory considerations enumerated in section 5(2)(c) and the National Transportation Policy. Plainly the Commission has no "delegated discretionary authority" thus to ignore express congressional mandates. Rules and principles adopted by the Commission must be "consistent with the statutory standards which govern its action". *Eastern-Central Motor Carriers Assoc.* v. *United States*, 321 U.S. 194, 211.

That there have been "more than 20 years of regulatory experience in the motor carrier field" does not show obsolescence of section 5(2)(b) or section 5(2)(c) or the National Transportation Policy. Moreover, if any of those provisions were obsolete, it would be for Congress, not the

---

[21] There is clearly no basis for equating the fact of a "law violation" with inconsistency with the public interest. See, e.g., *Petition of Knight*, 122 F. Supp. 322 (S.D.N.Y. 1954) (naturalization examiner erred in finding lack of "good moral character" on basis of criminal conviction without considering contents of indictment, plea, verdict and sentence). This Court has long held that the legislature may not create presumptions without a rational basis. See, e.g., *Tot* v. *United States*, 319 U.S. 463. *A fortiori* an administrative agency must exercise its much more limited discretion in a rational manner. See, e.g., *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 652-53; *Colorado Wyoming Gas Co.* v. *Federal Power Commission*, 324 U.S. 626, 634; *cf. Slochower* v. *Board of Higher Education*, 350 U.S. 551; *Wieman* v. *Updegraff*, 344 U.S. 183.

Commission, to change them; meanwhile those provisions are guides which the Commission must follow in considering section 5(2) applications. The Commission clearly erred by ignoring the considerations prescribed by Congress and automatically denying the application because a "law violation" had been found. *See Interstate Commerce Commission* v. *J-T Transport Company, Inc.*, 368 U.S. 81, 88-90; *National Labor Relations Board* v. *Insurance Agents' International Union*, 361 U.S. 477, 490; *Truitt Mfg. Co.* v. *National Labor Relations Board*, 351 U.S. 149, 153; *id.* at 155 (dissenting opinion); *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86; *Garthy & Tanzola, Inc.* v. *United States*, 115 F. Supp. 72 (S.D. Cal. 1953).

Moreover, even if the Commission were entitled to disregard sections 5(2)(b) and 5(2)(c), nothing suggested in the Commission's Report or the District Court's opinion could possibly justify the Commission's decision.

The principles announced by the Commission "that a violation of law should not be rewarded" and "should not be 'blessed' by approval" clearly are not meaningful except in the case of a willful violation. However, the Commission's denial of the section 5(2) application was based upon the fact of "law violation", regardless of whether the violation was willful or innocent; indeed, in the present case, even if the Commission could find a "law violation", it certainly could not find a willful violation. (See note 19, *supra*.) The Commission's disregard of the distinction between a willful and an innocent "law violation"—a distinction which (as has been shown) was well established in the context of the "fitness" doctrine—was error. Cf. *International Ladies' Garment Workers Union, AFL-CIO* v. *National Labor Relations Board*, 365 U.S. 731, 740; cases cited note 21, *supra*.

Moreover, the Commission's pre-occupation with keeping

a violation of law from being "rewarded" or "'blessed'" and the District Court's concern about unification "precipitately . . . effectuated . . . without permission", to the exclusion of all other considerations, are unrealistic. In fact, applicants who have previously violated section 5(4) are not in any better position because of their violation. In no sense is a "*tait accompli*" presented to the Commission: for example, even if the appellants could be said to be guilty of a section 5(4) violation it is quite clear that no merger has been accomplished. And any approval granted is pursuant to section 5(2)(b), "subject to such terms and conditions and such modification" as the Commission finds just and reasonable.[22]

The attitudes expressed by the Commission and the District Court also ignore the fact that all parts of section 5 of the Act were designed to promote the National Transportation Policy, a policy which favors merger and consolidation for the furtherance of the public interest. *County of Marin* v. *United States*, 356 U.S. 412, 416-18; *Schwabacher* v. *United States*, 334 U.S. 182, 194 & n. 14; see 54 Stat. 899, p. A-1, *infra*. The particular role of section 5(4) was to forbid mergers which were inconsistent with the National Transportation Policy and the public interest. See *Hearings on H. R. 9039 Before the House Committee on Interstate and Foreign Commerce*, 72d Cong., 1st Sess., at 19-26 (1932). Inasmuch as a merger involving persons

---

[22] Under the provisions of the Federal Aviation Act of 1958, §§ 408 and 409, 72 Stat. 767-68, as amended, 74 Stat. 901 (1960), 49 U.S.C. §§ 1378 and 1379, which are comparable to sections 5(2) and 5(4) of the Interstate Commerce Act, the Civil Aeronautics Board has carefully avoided adopting a rule of automatic disqualification because of effectuation of unauthorized joint control in violation of law, although it will refuse to consider an application until the applicants have purged themselves of any unlawful relationships. See *Charles C. Sherman*, 15 C.A.B. 876 (1952); *cf. Atlas Corporation*, 21 C.A.B. 425 (1955).

who have previously violated section 5(4) or even a merger prematurely carried out may nevertheless be in the public interest and desirable to promote the National Transportation Policy, it is obvious that undue emphasis on a prior "law violation" or on "precipitate" effectuation is contrary to the intent of Congress. Regardless of whether automatic denial of a section 5(2) application because of a "law violation" is said to be "a penalty to those particular respondents," or a device to encourage and protect "existing carriers endeavoring faithfully to comply with the law" (R. 23), such a denial is clearly inappropriate, for it tends to defeat the overall policy of section 5 and it subjects the persons who are held to have violated section 5(4) "to disabilities not intended by Congress as a result of" such a violation. *National Labor Relations Board* v. *District 50, United Mine Workers*, 355 U.S. 453, 463.

III. Although the Commission Inserted a Requirement of Divestiture in Its Order, There Is No Indication That the Commission Exercised Discretion With Respect to That Requirement

After rejecting the Examiner's recommendation that appellants' section 5(2) application be approved, Division 4 issued an order directing appellants "to terminate the violation of the provisions of section 5(4) of the Interstate Commerce Act" (R. 94); the Commission not only adopted *verbatim* all of the operative paragraphs of Division 4's order but it also added a new, additional paragraph directing appellants "to divest themselves of any and all interest which they may have in the capital stock of Gilbertville Trucking Co., Inc." (R. 26).

Whether a divestiture order should be entered had never been argued or considered as an issue in the case, and

nothing in the Examiner's Report or Division 4's Prior Report even suggested the possibility of such a drastic remedy. Yet the Commission's Report did not state any findings or reasoning with respect to the requirement of divestiture or in any way attempt to justify or explain that requirement. Indeed, the Report concludes simply, in the same words Division 4 used when it did *not* require divestiture, "An appropriate order, which will deny the application and require the respondents named above to terminate the violation of section 5(4) of the act, will be entered." (R. 24, 93) Nothing in the Commission's Report even hints that its order includes a requirement of divestiture.

The Commission's remedial power is granted by section 5(7) of the Interstate Commerce Act, which empowers the Commission "by order [to] require such person [found to be violating section 5(4)] to take such action as may be *necessary*, in the opinion of the Commission, *to prevent continuance* of such violation." Undoubtedly that grant of power is broad enough to authorize issuance of a divestiture order in an appropriate case. But mere power is not sufficient to sustain an order of the Commission. Section 5(7) not only confers upon the Commission discretion to determine what order is "necessary, in the opinion of the Commission," but, as the word "opinion" indicates, it also charges the Commission with the concomitant responsibility of exercising that discretion. "[T]he power with which Congress invested the [Commission] . . . implies responsibility—the responsibility of exercising its judgment in employing the statutory powers." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194; see, e.g., *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613.[23]

[23] The requirement that an administrative agency must use its power pursuant to a responsible exercise of judgment is implicit in this Court's

Moreover, what "action" is "necessary . . . to prevent continuance of such violation" is clearly one of the "material issues of fact, law, or discretion presented on the record" with respect to which section 8(b) of the Administrative Procedure Act requires "a statement of (1) findings and conclusions, as well as the reasons or basis therefor." See pp. 13-14, *supra* and cases there cited. Even before the enactment of the Administrative Procedure Act, this Court required that an administrative agency, in exercising its discretion, "disclose the basis of its order . . . [and] give clear indication that it has exercised the discretion with which Congress has empowered it." *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 197. The requirement that an administrative agency "disclose the basis of its order" is fundamental to our legal system, for only such disclosure makes meaningful judicial review possible and ensures that an agency to which Congress grants discretion will not seize absolute and unlimited power.[24] *Eastern-Central Motor Carriers Assn. v. United States*, 321 U.S. 194, 209; *Panama Refining Co. v. Ryan*, 293 U.S. 388, 431; *Saginaw Broadcasting Co. v. Federal Communications Commission*, 96 F.2d 554 (D. C. Cir. 1938), *cert. denied*, 305 U.S. 613; Landis, *The Administrative Process* 98

repeated refusal to enforce exceptionally broad cease-and-desist orders unless warranted by the special circumstances of the case. See *Federal Trade Commission v. Henry Broch & Co.*, 368 U.S. 360, 367-68; *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 426. As Federal Trade Commissioner Elman has said, "Since 'the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist' . . . , the 'reasonable relation' of the order to the facts should be shown." *Vanity Fair Paper Mills, Inc.*, 3 CCH Trade Reg. Rep. Par. 15,796, p. 20,612 (dissenting opinion).

[24] "Unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty." *New York v. United States*, 342 U.S. 882, at 884 (Douglas, J. dissenting).

(1938); cf. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 Harv. L. Rev. 904 (1962). Forcing an agency to articulate the basis of its decision also promotes sound administrative decision-making by preventing the agency from leaping to conclusions, such as the divestiture order in the present case, which prove erroneous when an attempt is made to formulate "reasons or basis therefor." *United States* v. *Forness*, 125 F.2d 928, 942 (2d Cir. 1942), *cert. denied sub. nom. Salamanca* v. *United States*, 316 U.S. 694; Landis, *The Administrative Process* 105-06 (1938).[25]

When the remedy ordered by the agency is a particularly drastic one, correspondingly it is particularly important that the agency have carefully explored (and given "clear indication" that it has explored) possible alternatives, so that, if some other effective remedy is available which would inflict less harm upon the addressees of the order, that alternative may be discovered and unnecessary harm may be avoided. See *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 602-03; *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613; cf. *Local 60, United Brotherhood of Carpenters & Joiners* v. *National Labor Relations Board*, 365 U.S. 651. Thus, in the *Jacob Siegel* case, this Court remanded the case to the Federal Trade Commission for a determination as to whether the absolute prohibition of the use of a trademark ordered by the FTC was necessary to achieve effective termination of a misbranding violation. The Court held that complete excision

---

[25] "Any judge can testify to the experience of working on opinions that won't write with the result that his conclusions are changed because of his inability to state to his satisfaction the reasons upon which they depend. Delegation of opinion writing has the danger of forcing a cavalier treatment of a record in order to support a conclusion reached only upon a superficial examination of that record. General impressions rather than that tightness that derives from the articulation of reasons may thus govern the trend of administrative adjudication." Landis, *supra* at 106.

of the name from the respondent's brands should be ordered only if there was no alternative available, but, because the Commission failed to indicate that if had exercised its discretion,

> "we are left in the dark whether some [less drastic remedy] . . . would in the judgment of the Commission be adequate." (327 U.S. at 613)

As this Court has frequently recognized, see, e.g., *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316, 326, a divestiture order is among the most drastic of remedies. The brutal impact of the Commission's order in the present case on Kenneth, the sole stockholder of Gilbertville Co., is undeniable. The divestiture order would require him to give up the entirety of his interest in the company to which he has devoted the last nine and one-half years of his life and which he has developed into a successful and vigorous trucking company. (See R. 51, 116) It is evident that, upon a forced sale pursuant to the Commission's order, Kenneth would not receive even approximately a fair price, if there is any market at all for such a motor carrier. On the facts of this case, application of the remedy of divestiture, which is inherently drastic, would be peculiarly harsh and inappropriate.

This Court has repeatedly ruled that a divestiture order should be included in a decree only where absolutely necessary. See *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316, 327; *Hughes* v. *United States*, 342 U.S. 353; *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 412-14; *United States* v. *Reading Co.*, 253 U.S. 26, 64; *United States* v. *Lehigh Valley R.R.*, 254 U.S. 255, 270. See also United States Attorney General's Committee, *Study of the Antitrust Laws* 353-55 (1955). And the harshness of divestiture has often led this Court to qualify or withhold this drastic

remedy. For example, in *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 602-03, the majority of the Court held:

> "Since divestiture is a remedy to restore competition and not to punish those who restrain trade, it is not to be used indiscriminately, without regard to the type of violation or whether other effective methods, less harsh, are available. That judicial restraint should follow such lines is exemplified by our recent rulings in *United States* v. *National Lead Co.*, 332 U.S. 319, where we approved divestiture of some properties belonging to the conspirators and denied it as to others, pp. 348-353. While the decree here does not call for confiscation, it does call for divestiture. I think that requirement is unnecessary."

See *United States* v. *National Lead Co.*, 332 U.S. 319, 351; *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 426; *Continental Insurance Co.* v. *United States*, 259 U.S. 156, 170 (dictum); cf. *United States* v. *American Tobacco Co.*, 221 U.S. 106, 185-87.

In the present case, the District Court attempted to excuse the Commission's failure to state the required finding as to necessity and "the reasons or basis therefor" by ruling that as a matter of law in any case involving an unlawful acquisition of control a divestiture order may be entered without regard to other circumstances[26] and sought

[26] Even if the novel rule of law essayed by the District Court were sound, such subsequent rationalization by a reviewing court cannot be an adequate substitute for the statement of findings and "reasons or basis therefor" which the Commission was required to make. Congress vested discretion in the Commission to order action "necessary, in the opinion of the Commission"—not action necessary in the opinion of the District Court. Thus the important question is whether, and how and why, that discretion was exercised by the Commission.

support for that ruling in this Court's recent decision in the *duPont* case. But the *duPont* case does not support either the Commission's action or the District Court's rationalization. Neither that case, nor the long line of antitrust decisions involving divestiture which it followed, justified an absolute rule of divestiture without regard for necessity, even in the context of restoring healthy competitive conditions required by the antitrust laws. In the *duPont* case this Court ruled only that divestiture should be imposed "if the Court concludes that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief." (366 U.S. at 327). This Court recognized that "hardship can influence choice . . . among two or more effective remedies" *(ibid.)*, not only by saying so, but also by considering at great length the very question the Commission ignored in the present case—whether divestiture was necessary. (366 U.S. at 331-34).[27]

Moreover, because the Interstate Commerce Commission is required to consider the National Transportation Policy in administering the Act, *Schwabacher v. United States*, 334 U.S. 182, 191-94, the factors governing a court's decision as to whether a divestiture order is necessary in an antitrust case are substantially different from those the Commission must consider pursuant to section 5(2). The fact that the antitrust laws are intended to break up monopolistic structures in order to restore competitive conditions has typically been the basis of decisions that decrees of divestiture or dissolution are necessary in antitrust cases.[28]

---

[27] Traditionally defendants against whom a decree of divestiture might be entered have been given full opportunity to be heard on the question of the decree. See, e.g., *United States v. American Tobacco Co.*, 221 U.S. 106, 185; *United States v. Minnesota Mining & Mfg. Co.*, 96 F. Supp. 356 (D. Mass. 1952), *modifying decree issued following discussion in* 92 F. Supp. 947, 966 (1950).

[28] *Schine Theatres v. United States*, 334 U.S. 110, 128-29; *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 77-78; Adams,

In contrast, antitrust considerations have been relegated to a minor role in section 5 of the Interstate Commerce Act, which is designed primarily to promote the National Transportation Policy and accomplish the creation of a strong national transportation system. See *McLean Trucking Co. v. United States* 321 U.S. 67, 83; Levi, "Section 7 of the Clayton Act—Regulated Industries," *How To Comply with the Antitrust Laws* 136, 147 (1959 CCH Antitrust Symposium). Whereas the congressional policy of promoting and encouraging mergers and consolidations of carriers is of long standing and persists in the present statute,[29] Congress has at the same time been very wary about divestiture in the transportation field.[30] Divestiture, as such, has never been expressly sanctioned by Congress in the context of section 5. Even the much more limited remedy of cancellation of voting rights won congressional approval only for the limited purpose of protecting the consolidation

Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust, 27 Ind. L.J. 1, 4 (1951); Timberg, *Some Justifications for Divestiture*, 19 Geo. Wash. L. Rev. 152, 156 (1950). This Court described the statute involved in the *duPont* case as "narrowly directed" to outlawing "a particular form of economic control—stock acquisitions which tend to create a monopoly of any line of commerce" (366 U.S. at 329).

[29] H.R. Rep. No. 456, 66th Cong., 1st Sess. at 6, 18 (1919); H.R. Rep. 650, 66th Cong. 2d Sess. at 63 (1920); S. Rep. No. 87, 73rd Cong., 1st Sess. (1933); H.R. Rep. 193, 73d Cong., 1st Sess. at 16 (1933); H.R. Rep. No. 1217, 76th Cong., 1st Sess. at 6 (1939); S. Rep. No. 433, 76th Cong., 1st Sess. at 28 (1939); H.R. Rep. No. 2016, 76th Cong., 3d Sess. at 61 (1940); see *County of Marin v. United States*, 356 U.S. 412, 416-18; *Schwabacker v. United States*, 334 U.S. 182, 192-94; *Escanaba & Lake Superior R.R. v. United States*, 303 U.S. 315, 320; Levi, "Section 7 of the Clayton Act—Regulated Industries," *How to Comply With the Antitrust Laws* 136, 146-47 (1959 CCH Antitrust Symposium).

[30] Even the proposal that the Commission have power to order divestiture in special cases where control of a carrier tended to defeat the national consolidation plan, see *Hearings on H.R. 9059 Before House Committee on Interstate and Foreign Commerce*, 72d Cong., 1st Sess. at 19, 36 (1932), was weakened so as merely to provide for divestiture of voting power, see H.R. Rep. No. 193, 73d Cong., 1st Sess. at 23, 24 (1933).

plan which the Commission was at one time directed to adopt and was promptly repealed when the consolidation plan was abandoned as a specific means of effectuating Congress's policy. See S. Rep. No. 433, 76th Cong., 1st Sess. at 31 (1939).

Divestiture is essentially an equitable remedy, *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316, 326, and it is an inherent characteristic of equitable relief that it adapts itself to the particular needs and the particular facts of a given case. See *Brown* v. *Board of Education of Topeka, Kansas*, 349 U.S. 294, 300; *Pomeroy, Equity Jurisprudence* 109 (5th ed. 1941):

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Company* v. *Bowles*, 321 U.S. 324, 329-30; see *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632.[31]

In formulating remedial orders, the Commission is in a position analogous to a court of equity; see Landis, *The Administrative Process* 96 (1938); cf. *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 433, 436, and is clearly required to exercise a comparable dis-

[31] The fact that the Commission's order was being issued more than six years after the time of the violation found by the Commission ("the time he [Kenneth] purchased the stock of Gilbertville" (R. 21)) should also have been a factor considered by the Commission in selecting an appropriate remedial order. Cf. *United States* v. *United Shoe Machinery Co.*, 247 U.S. 32, 45-46. This Court has recently recognized the inappropriateness of basing a remedial order on a stale record. *United States* v. *Borden Co.*, 370 U.S. 460, 471-72.

cretion in considering all relevant factors and shaping its orders to the circumstances of the particular case.

There were two conditions precedent to the Commission's authority to require Kenneth to divest himself of the stock of Gilbertville Co.: *first*, the Commission, by a meaningful exercise of discretion, considering all the circumstances of the present case and considering other available remedies which might be effective, had to determine that the requirement of divestiture was "necessary . . . to prevent continuance of such violation"; and, *second*, the Commission had to state, in the form of findings and "the reasons or basis therefor," not only *that* divestiture was necessary, but also *why* it was. In light of the well-established congressional policies embodied in sections 5 and the National Transportation Policy and of the flexibility with which the Commission may formulate its decrees, it seems clear that a number of effective alternative remedies must have been available to the Commission in the present case.[32] Therefore it seems unlikely that the harsh divestiture order could have been found "necessary", which in turn suggests that

[32] For example, inasmuch as the Commission's finding that Kenneth was "affiliated" with Nelson Co., which was the basis of the Commission's finding of a violation, implies that the Commission found some unidentified "relationship" (see pp. 14-16, *supra*), an order directed to severing that "relationship" would appear to be a completely satisfactory and effective way of terminating the supposed violation. Such an order would not involve the hardship inherent in the Commission's order that Kenneth sell the stock of Gilbertville Co. and seems much more logical than ordering Kenneth to sever his relationship with Gilbertville Co., with which he is completely identified as sole stockholder, principal officer and director. Because the violation the Commission found was, essentially, that Kenneth was "affiliated"—or linked—with both Gilbertville Co. and Nelson Co., it would seem elementary that breaking either link would break the chain. A meaningful exercise of discretion, it would seem, might be expected to have resulted in an order directed to the accomplishment of the less harsh of the two possible severances, or perhaps an order giving Kenneth a choice between the two. See, e.g., *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 426; *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 188-89.

the Commission's divestiture order was not the result of any meaningful exercise of discretion. But regardless of whether or not the Commission in fact exercised discretion, the Commission unquestionably failed to state either the required finding or the required reasons or basis or in any other way to give a "clear indication" that it had exercised discretion, and that failure clearly constitutes reversible error.

IV. The District Court Did Not and Could Not Find the Commission's Decision or Its Findings Supported by Substantial Evidence.

This Court has held that "substantial evidence" or "the whole record" must be "'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *Consolidated Edison Co.* v. *Labor Board*, 305 U.S. 197, 229. Accordingly, it 'must do more than create a suspicion of the existence of the fact to be established' . . . *Labor Board* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300.'" *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 477. However, when appellants argued to the District Court that neither the Commission's decision in the present case nor a number of its findings met those tests, the District Court merely quoted from defendants-appellees' brief "the essential portion of the text" of the Commission's Report "with the supporting transcript references conveniently supplied by defendants" and concluded "that the statements of the LCC are supported by evidence." CR 115, 121; see R. 117-20. Plainly the District Court's holding that the Commission's findings were supported by "evidence", rather than "substantial evidence" was an error of substance, not merely one of semantics, for the District Court, in its reliance upon the "evidence" cited by appel-

lees' brief, neglected to "take into account whatever in the record fairly detracts from its weight." (340 U.S. at 488).

Most of the facts recited by the Commission's Report are so obviously innocent and irrelevant that no argument is necessary to show that those findings, even though in many respects they are unclear or inaccurate,[33] cannot sustain the Commission's decision. One series of statements in the Report (R. 20-21), however, contains such ambiguous, exaggerated and baseless language that it merits brief comment.

(a) The statement that Gilbertville Co. "constantly . . . leases from a pool of equipment maintained by Nelson" (R. 20) is a distortion of the facts. Nelson Co. frequently had much idle equipment not because it "maintained" a "pool", but because Nelson Co.'s operating authority (R. 144-45) made its business primarily dependent upon a "particular line of specialized commodities, namely, textiles, . . . [which] has a very, very wide fluctuation of usage of equipment" (R. 432) and which had been moving southward out of New England (R. 394-95). Nor did Gilbertville Co. depend upon any such "pool". Gilbertville Co., buying on conditional sale (R. 377-79), increased and upgraded its vehicle inventory as rapidly as it could (R. 458), and by the end of July 1956 owned thirty-five vehicles, including twenty-three made in 1955 or 1956 (R. 349, 447-49, 672), but, because it was continually hampered by lack of working capital and consequent poor credit (R. 218-20, 337, 340-43, 457-58), Gilbertville Co. could not buy enough vehicles

---

[33] For example, the Report fails to state that the Bergson Company, an outgrowth of the estate of Mrs. Linnea Nelson, owns substantial amounts of real estate in addition to the terminals mentioned (R. 368-70, 385). And it does not mention that the carrier which leases the New York City terminal to Nelson Co. also shares in its use or that Blue Line Express is another tenant in common of the Woonsocket, R.I. terminal and of the telephone there. (R. 414-17, 437-38).

for its rapidly expanding business.[34] Gilbertville Co. thus was frequently forced to lease equipment from Nelson Co. and two other companies (R. 483, 485, 487) under written leases accompanied by the inspection reports required by Commission regulations. (R. 513-14, 623-24) Moreover, except that the only vehicles (if any) available for Gilbertville Co. to lease from Nelson Co. on any given day (if Gilbertville Co. needed to lease them) were those (if any) which were left after Nelson Co. had satisfied all of its needs (R. 413, 430, 433-34), there was no correlation between the number of vehicles leased by Gilbertville Co. on any given day (which varied from 0 to 6) (R. 413, 482, 516) and the number of Nelson Co. vehicles standing idle (which varied from 0 to 40) (R. 433).

(b) The "same group of drivers" which "[b]oth draw upon" (R. 20) was nothing more than the "spare" drivers in the particular area (R. 516)—that is, men at the bottom of the union seniority list, who made their living going from company to company and might well work for five carriers in five days (R. 510, 532).[35] Nelson Co. considered 79 drivers as its employees and Gilbertville Co. so considered 53 drivers. (R. 291, 456) But the practice in the

[34] The business of Gilbertville Co., which in March of 1953 had only eight vehicles and a large capital deficit (R. 212, 219), "flourished under the direction and ownership of Kenneth" (R. 116); Gilbertville Co.'s average monthly operating revenue for January through July of 1956 was more than ten times what it had been in 1953. (R. 51).

[35] Thus a few drivers who worked for Gilbertville Co. appeared on the union seniority list for Nelson Co. (R. 548), doctor's certificates for a number of drivers who worked for Nelson Co. were kept on file by Gilbertville Co. (R. 578), and some drivers who worked for Nelson Co. (presumably the more senior ones) had not worked for Gilbertville Co., whereas other drivers had worked for both Nelson Co. and Gilbertville Co. (R. 612). The Commission investigators never checked the drivers named on the seniority list or the doctor's certificates against employment records of other motor carriers. (R. 581-86, 638)

industry was that men were told not to report to work when there was no work for them, (R. 524) and when extra men were needed they would be hired (regardless of for what other carriers they might previously have worked), either from a list of spare men or through the union hiring hall (R. 514, 516, 517).

(c) In general, the small percentage of shipments which Nelson Co. and Gilbertville Co. interlined with each other[36] were handled like all interline shipments. (R. 397-98. That Nelson did all of the billing on shipments interlined with Gilbertville was certainly not unique, for Nelson did all billing on shipments it interlined with a carrier in Pennsylvania (Showalter) and on certain other shipments as well. (R. 435-37) Fixed percentage divisions of interline revenue were used by many other motor carriers (R. 640-41) and had been established by Gilbertville Co. with three carriers other than Nelson Co. (R. 451-52, 472-73) and by Nelson Co. with Showalter (R. 435-37).[37] As the testimony just cited showed, such a fixed percentage was simply a means of greatly simplifying the calculation of shares of revenue on an interlined shipment by establishing a stabilized figure, which, based on experience, could be expected over a period of time to give each carrier the same revenue it would get by strict mileage pro-ration of each shipment.

(d) The industry practice whereby a "spare" driver

---

[36] Only two to three per cent of the shipments carried by Nelson Co. involved an interline with Gilbertville Co. (R. 399) and Nelson Co. also interlined with 15 to 20 other carriers, including some 6 competitors of Gilbertville Co. (R. 395-96, 442-43). Gilbertville Co. interlined with about 50 carriers, and interlines with Nelson represented only about five per cent of the shipments it carried. (R. 450)

[37] Although Inspector LaCour "would regard the 60-40 arrangement as an unusual one", as the Examiner observed, "that doesn't make it so unusual." (R. 619) And the same Inspector LaCour contended, in connection with an attempt to prove that Gilbertville Co. had failed to observe a gateway, that "no part of the Town of Palmer, Mass. is within 10 miles of . . . Route 83" (R. 614), although, as counsel later stipulated, the distance is really less than 9 miles (R. 665-66).

with low seniority might "be employed by both companies [and perhaps three others] during the same pay period" has been referred to in paragraph (b), *supra*. It is clear that no driver worked for more than one carrier at the same time. (R. 611)

(e) The Commission's assertion that "on those occasions where a shipment moves from a point in the territory of one to a point in the territory of the other the same driver and vehicle will perform the through movement" was not supported by substantial evidence. Gilbertville Co. and Nelson Co., in connection with interlining of truckload shipments, did interchange trailers.[38] But they normally did not interchange when the shipment involved was less-than-truckload. (R. 452, 463-65, 465-69, 494-97). Moreover, the same driver did not "perform the through movement." (R. 352, 510, 515), and if the motive power ever went through, it was by coincidence rather than design. (R. 495-97) The only thing in the record which even tends to support the Commission's statement is something that Commission Investigator Shea says was told to him by one Mr. Kashady (R. 661-62) which, in light of the proven unreliability of other things Mr. Shea said Mr. Kashady said in the same conversation,[39] is plainly not substantial evidence.

(f) It seems too obvious for argument that there can be

---

[38] Although interchange of equipment technically involves mutual leases, it is a concept entirely different from leasing (R. 412-13, 497), and involves an exchange by carriers (on a one-for-one basis) of equipment laden with freight to be interlined for comparable equipment either empty or laden with other freight being interlined in the opposite direction. Interchange was a common (R. 405) and clearly lawful industry practice, see, e.g., *Railway Labor Executives' Association* v. *United States*, 151 F. Supp. 108 (D.D.C. 1957); *Houff Transfer, Inc.* v. *United States*, 105 F. Supp. 851 (D.W. Va. 1952) (absence of interchange cited as one reason for disapproving merger application).

[39] For example, Mr. Shea first said that Mr. Kashady said that Gilbertville Co.'s stock records and accounting records were at Ellington (R. 550-57, see R. 665), but he later said that Mr. Kashady said he did not know where such records were (R. 660).

nothing unlawful in the fact that Gilbertville Co. and Nelson Co. obtain "accounting and financial advice" as two of "a few hundred" (R. 286) clients of an independent public accountant (R. 184, 199, 223, 224, 244).

(g) The Commission's assertion "each operates to some extent, at least, under managerial direction from officers of the other", according to Commission counsel's citations which the District Court adopted, is supported by certain testimony of Messrs. Shea and LaCour. (R. 529-34, 537-38, 616-18). All that is relevant in the cited testimony is (1) that Kenneth operated a teletype machine and answered telephone calls—scarcely activities of "managerial direction", (2) that Kenneth "instructed" a Nelson Co. employee named Seiferth "to bring a certain vehicle up to the office" and "then told him to take it back down again" (R. 530, 532, and (3) that Mr. Shea thought he saw Kenneth "issuing instructions, three times in our presence, to Mrs. Marjorie Edwards, whom we later found was in charge of the L. Nelson & Sons Co. office." (R. 533) On cross-examination Mr. Shea admitted that he did not know what Kenneth and Mrs. Edwards had talked about; "simply she would ask him a question; he would give her an answer." (R. 582) Of course, it was perfectly natural and proper for Kenneth (on behalf of Gilbertville Co.) to talk to Nelson Co. (represented by Mrs. Edwards) in connection with interlined shipments, leases of equipment or other matters of business between the two carriers, or to ask Mr. Seiferth to bring around for Kenneth to see a truck which Gilbertville Co. was going to lease, or to send a teletype message or talk on the telephone. And it does not appear that Messrs. Shea and LaCour saw anything other than such activities. Moreover, nothing in the cited testimony even remotely suggests any "managerial direction" of Gilbertville Co. by any officer of Nelson Co. The Commission's statement with respect to "managerial direction" is not based on substan-

tial evidence, but just on suspicions—suspicions like those underlying the argument, rejected in *Braga v. Western Massachusetts Theatres, Inc.*, 288 F.2d 302, 305 (1st Cir. 1961), that "if everyone acts alike it shows conspiracy but if they act differently it merely means concealment."

(h) The statement that "they are liberal with each other in settlement of interchange accounts" (R. 21) is based solely on Mr. LaCour's statement that as of November 5, 1955, "in round figures" Nelson Co. owed Gilbertville Co. approximately $39,000 on account of interline settlements and Gilbertville Co. owed Nelson Co. roughly $19,000 for equipment rental (R. 622). But those figures are meaningless, for they do not indicate how much was due to or receivable by either corporation on account of other items. Inasmuch as substantial amounts became due monthly from Gilbertville Co. to Nelson Co. on account of rent and such items (R. 517-21) and Mr. LaCour admitted on cross-examination that he had not covered the complete account between the two companies (R. 641-42), it is perfectly possible that the balance of account might have been even to the last penny. Indeed, in August 1956, Nelson Co. owed Gilbertville Co. nothing and Gilbertville Co. owed Nelson Co. only some $1,400 for charges incurred in July 1956 (R. 352, 370-71).

(i) There was no substantial evidence that traffic was commingled by the companies "whenever it suits their convenience." (R. 21). The evidence did show that three Nelson Co. vehicles (one inspected May 12, 1955 (R. 588) and two inspected May 2, 1956 (R. 365-71, 374-76)) were criticized for each carrying one small shipment (respectively 85, 270, and 158 pounds) apparently covered by a Gilbertville Co. "pro", and that a Gilbertville Co. vehicle, also inspected on May 2, 1956, was criticized for carrying a shipment of greased wool apparently moving on a Nelson "pro" (R. 627-34). However, the evidence also shows that

the Commission had conducted repeated checks extending over a period of at least a year and a half (see R. 616), and had inspected many other vehicles of Gilbertville Co. and Nelson Co., both during the three-day effort of which the May 2, 1956 check was a part (R. 594-604, 645-49) and at other times (R. 604-06, 650), and no other evidence of such "commingled" traffic was found. Four criticisms resulting from so many checks do not constitute substantial evidence that commingling of traffic was either willful or "whenever it suits their convenience", particularly in light of the small size of the shipments improperly on the Nelson Co. vehicles and the fact that three of the four incidents occurred on a single day when the principal officers of the companies were apparently out of town. (R. 649-50) The only finding which could be supported by the evidence was a finding, like that the Examiner made, that "there is no evidence of extensive or flagrant violations of either the act or the regulations. The violations shown . . . appear to be the result in some cases of ignorance of the requirements, and in others of a degree of carelessness and not wilfulness." (R. 72)

Conclusion

For the reasons stated, appellants respectfully submit that the judgment of the District Court should be reversed.

Respectfully submitted,

Henry E. Foley
Loyd M. Starrett
William G. Buss, Jr.
10 Post Office Square
Boston 9, Massachusetts
Counsel for Appellants

Mary E. Kelley
10 Tremont Street
Boston 8, Massachusetts
Of Counsel

APPENDIX A

National Transportation Policy,
54 Stat. 899 (1940):

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Interstate Commerce Act 5(2), as Amended,
54 Stat. 905 (1940), as
amended, 63 Stat. 285 (1949):

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers

jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; . . .

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(c)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad sub-

ject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

Interstate Commerce Act (54 p. as amended, 54 Stat. 907 (1940)):

(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and para-

graph (5), the words "control or management" shall be construed to include the power to exercise control or management.

Interstate Commerce Act, 5(5), as amended, 54 Stat. 907 (1940):

(5) For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

Interstate Commerce Act, 5(6), as amended, 54 Stat. 908 (1940):

(6) For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any

other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

Interstate Commerce Act (as amended, 54 Stat. 899 (1940).

(7) The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this part, and with respect to any violation of paragraphs (2) to (12), inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to the part shall apply to such a violation by any other person.

Administrative Procedure Act (60 Stat. 237 (1946).

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party, and as supported by and in accordance with the reliable, probative, and substantial evidence. . . .

Administrative Procedure Act (8(b), 60 Stat. 242 (1946):

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers, the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusion. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Administrative Procedure Act (10(e), 60 Stat. 243 (1946):

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required

by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to a trial de novo by the reviewing court. In making the foregoing determinations the courts shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.